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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 79

LEO H. STEELE, PETITIONER,

vs.

GENERAL MILLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1946.

CERTIORARI GRANTED MAY 27, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

No. 559-Civil

LEO H. STEELE, Plaintiff,

versus

GENERAL MILLS, INC., Defendant

STIPULATION AND AGREEMENT OF COUNSEL—Filed January 18, 1945

It is agreed and stipulated that this suit was originally instituted by plaintiff, Leo H. Steele, in this Court on January 31, 1944, and the original petition of plaintiff was filed in this Court on said date. It is also agreed and stipulated that the original answer of defendant, General Mills, Inc., was filed in this Court on May 1, 1944, and also that plaintiff's demand for admissions was filed in [fol. 2] this Court on February 25, 1944, and that defendant's reply to plaintiff's demand for admissions was filed in this Court on May 1, 1944, having been filed within the additional time allotted by the Court for that purpose.

This stipulation may be placed in the transcript on appeal in lieu of including such instruments.

Fort Worth, Texas, this the 8th day of January, A. D. 1945.

Culbertson, Morgan, Christopher & Bailey, by Cecil A. Morgan, Attorneys for Plaintiff; Miley Hoffman, France & Johnson, (Miley, Hoffman, France & Johnson).

Oklahoma City, Oklahoma.

Cantey, Hanger, McMahon, McKnight & Johnson, (Cantey, Hanger, McMahon, McKnight & Johnson), by Alfred McKnight, Attorneys for the Defendant.

Fort Worth, Texas.

IN UNITED STATES DISTRICT COURT

FIRST AMENDED COMPLAINT—Filed February 25, 1944

[Title omitted]

I

Leave of the Court first obtained, complainant Leo H. Steele, files this his first original amended bill of complaint and alleges:

[fol. 3] The complainant, Leo H. Steele, is a resident of Wichita Falls, Wichita County, Texas, brings this action against General Mills, Inc., a foreign corporation having a permit to do business in the State of Texas and doing business within the State of Texas and in the Fort Worth Division of the Northern District of Texas and having as its statutory agent for service (appointed pursuant to Art. 2031a Revised Civil Statutes of Texas, as amended) F. F. Dokern (address 1404 Republic Bank Building, Dallas, Texas) a resident of Dallas, Dallas County, Texas in the Northern District of Texas, to recover against said defendant under charges on various shipments of freight.

II

This Court has jurisdiction of this cause because the suit is between citizens of different states and more than three thousand dollars ($3,000.00) Dollars exclusive of interest and costs, is involved herein, as will clearly appear hereafter.

III

During all of the time relevant to this proceeding, complainant was a contract carrier operating under authority of The Railroad Commission of Texas and by virtue of Contract Carrier Permit No. 11449 as issued by The Railroad Commission of Texas, which Contract Carrier Permit authorized complainant to transport the products of General Mills, Inc. from Wichita Falls and Amarillo, Texas, to all points within a radius of one hundred fifty (150) miles of Wichita Falls and Amarillo, Texas, but exclu-ively in Texas. That said contract carrier permit was issued by the Railroad Commission of Texas pursuant to application filed by complainant based upon a contract for transportation of defendant's commodities be-

[fol. 4] tween complainant and defendant, which contract between the parties is attached hereto marked Exhibit "A" and made a part hereof as though set out herein in full. That pursuant to said application and contract as set out in Exhibit "A" hereof, which contract was a part of said application and is on file with the Railroad Commission, the Railroad Commission of Texas entered its order authorizing issuance to complainant of the aforesaid contract carrier permit and did issue said permit to complainant. That a copy of said order of the Railroad Commission of Texas is attached hereto marked Exhibit "B" and a copy of said contract carrier permit is attached hereto marked Exhibit "C," and each of said exhibits are made a part hereof as though written herein in full. That pursuant to contract as set out in Exhibit "A" and Contract Carrier Permit No. 11449 complainant transported commodities as will hereinafter more fully appear. All original records pertaining to the various, sundry and many shipments moved by complainant, are in the possession of defendant, and all facts relating thereto are peculiarly within the knowledge of defendant.

IV

During the period beginning with the 1st day of August, 1941 and to, but not including, November 1, 1943, complainant as such contract carrier transported various, sundry and thousands of shipments for defendant as he was authorized to do and during said period defendant paid complainant the total sum of Forty-four Thousand Eight Hundred Three Dollars and thirty-three cents ($44,803.33).

V

Section 6 aa of Article 911 b Vernons' Annotated Civil Statutes of Texas, authorizes and requires the Railroad [fol. 5] Commission of Texas to prescribe rates applicable to and to be observed by all contract carriers operating under authority of The Railroad Commission of Texas (Article 911 b of the Texas Statute requires all contract carriers to obtain permits before such operations can be lawfully carried on) and pursuant to such authority and requirement The Railroad Commission of Texas has, and during all times revelant hereto had, prescribed rates ap-

plicable to and to be observed by contract carriers, such as complainant, and the rates prescribed by The Railroad Commission of Texas and applicable to and required to be observed by both complainant and defendant on all transportation and shipments involved herein are contained in Railroad Commission of Texas, Motor Freight, Class and Commodity Tarriff No. 1A and Supplements to or amendments thereof. That pursuant to Section 6aa of Article 911b the Railroad Commission of Texas first prescribed a general schedule of minimum rates by its General Order No. 25 in the year 1931, a copy of which General Order is attached hereto as Exhibit "D" and made a part hereof as though set out herein in full; that said order with amendment has continued in effect to date and was in effect during all times pertinent to this proceeding; that pursuant to said order there appears in Railroad Commission of Texas, Motor Freight, Class and Commodity Tariff No. 1A, naming rates, ratings, rules and regulations governing intrastate transportation of property by common carrier motor carriers and *contract* motor carriers between points in Texas as issued by the Railroad Commission of Texas, as effective and applicable at all times relevant to this proceeding, Item No. 470, at page 15 of Section No. 3 of said tariff the following requirement:

[fol. 6] "General Application of Rates."

"Item No. 470. Rates, Rules and Regulations in this Tariff, or as may amended, shall be observed:

(A) By Common Carrier Motor Carriers on Texas intrastate traffic. (See exceptions).

Exception: The rates, ratings, rules and regulations provided herein will not apply between Beaumont and Pt. Arthur on traffic transported by F. N. Ragsdale for the account of Railway Express Agency, Incorporated.

(B) By Contract Motor Carriers, as minimum, on Texas intrastate traffic, unless permits isued by the Commission provided to the contrary."

A copy of said requirements of said tariff is attached hereto, marked Exhibit "E" and made a part hereof.

That Contract Carrier Permit No. 11449 contains no contrary provision but on the other hand the order of the

Railroad Commission granting said permit (see Exhibit "B") specifically calls attention to the rate requirements of the law and of the Commission.

By the aforesaid orders of the Railroad Commission, said Commission, to whom is committed the original exclusive jurisdiction to determine all questions of competition and the substantiality of service, has determined such question and has fixed a schedule of minimum rates to be observed by contract carriers and shippers alike. Complainant further alleges that when his application for a contract carrier permit authorizing him to serve defendant alone as a contract carrier was heard before the said Commission that he appeared at said formal hearing and that [fol. 7] there appeared with him one Mr. McCraney, Traffic Manager for defendant at defendant's offices in Oklahoma City, Oklahoma, said McCraney being an agent and representative of defendant; that Mr. McCraney testified under oath before the Railroad Commission in support of said application and on behalf of General Mills, Inc.; that if defendant is not bound by the rates fixed and prescribed by the Railroad Commission of Texas as a matter of law that in such event that complainant and defendant agreed by paragraph 13 of their contract as filed with said Commission, Exhibit "A" hereof, to be bound by the rates as fixed and prescribed by said Commission and defendant is now estopped to question said rates in any respect.

VI

Under the rates prescribed by the Railroad Commission of Texas as contained in the aforesaid tariff and applying said rates to the various, sundry and many shipments, shipped by defendant over the facilities of complainant, defendant should have paid (applying the only lawful rate thereto) complainant the sum of Seventy-seven Thousand Eight Hundred Fourteen Dollars Ninety-eight cents ($77,814.98) together with the three (3%) per cent Federal Transportation Tax, on the difference between the amount paid and the lawful amount which should have been paid, in the additional sum of Three Hundred Seventy-nine Dollars seventy-four cents ($379.74) for which complainant is liable, such that defendant now owes and is obligated and bound to pay to complainant the sum of Thirty-three Thousand Three Hundred Ninety Dollars Ninety-

nine Cents ($33,390.99) with legal interest, for which demand is here made. That in connection with the allegations of paragraph IV hereof and with the foregoing allegations complainant files herewith his exhibit "F" and [fol. 8] makes the same a part hereof for all purposes as though attached hereto, setting out by months each shipment, the date, the defendant's invoice number, the consignee where known, it being here alleged that the defendant has all the original invoices, the numbers of which are shown and the names of the consignees are peculiarly and alone within the knowledge of defendant; the commodity; origin and destination; the weight; the applicable rate and the total charges; also summarizing by months showing total applicable charges when the lawful minimum rates as prescribed by the Railrad Commission of Texas, as herein alleged, is applied; the Federal Transportation Tax after the same became applicable; the amount paid by the defendant applicable to such charges; and the amount of the undercharge for each month as here sued for.

VII

Complainant has heretofore demanded payment and the same has been refused.

Wherefore, complainant demands judgment against General Mills, Inc. for said sum together with interest, for its costs herein expended, and for all proper relief.

Culbertson, Morgan, Christopher & Bailey; by T. S. Christopher, (T. S. Christopher), Attorneys for Complainant. 806 First National Bank Building, Fort Worth, Texas.

Copy of the foregoing Amended Bill of Complaint has on this 24 day of February 1944 been served upon Alfred McKnight of the firm of Cantey, Hanger, McMahon, [fol. 9] McKnight & Johnson, Sinclair Building, Fort Worth, Texas, one of the attorneys for the defendant.

T. S. Christopher, Attorney for Complainant.

Copy received 2/24/44. S. B. Cantey, Jr.

(Exhibits attached to this Amended Complaint and marked "Exhibits A, B, C, D and E," appear in the Court Reporter's Transcript as plaintiff's Exhibits 1, 2, 3, 4 and 5, respectively.)

In United States District Court

Order Granting Defendant Leave to File Motion to Strike and Setting Time for Hearing on Motion to Strike and Extending Time for Defendant's Answer—Filed March 13, 1944.

[Title omitted]

Defendant, General Mills, Inc., hereby is given leave to file a motion to strike addressed to plaintiff's amended complaint and for a fuller and more definite statement with respect to certain allegations in said amended complaint, or for a bill of particulars in respect thereto, and said motion is hereby set for hearing and consideration before the Court on March 24, 1944, at 10:00 o'clock a. m., and the time in which deefndant might otherwise be required to answer said amended complaint is hereby extended until action by the Court upon the motion as aforesaid or until otherwise directed by the Court.

[fol. 10] It is further ordered that the time in which defendant is required to answer plaintiff's demand for admissions, filed herein on February 25, 1944, is extended to the extent and so that defendant may reply to such demand on or before forty-five (45) days from March 10, 1944.

Dated at Fort Worth, Texas, this the 13 day of March, A. D. 1944.

James C. Wilson, United States District Judge.

O. K. Culbertson, Morgan, Christopher & Bailey. By Cecil A. Morgan.

In United States District Court

Defendant's Motion to Strike and/or to Make More Definite and Certain—Filed March 13, 1944.

[Title omitted]

Leave of the Court first obtained, defendant, General Mills, Inc., files this its motion to strike and/or to require plaintiff to make more definite and certain the allegations of his amended bill of complaint hereinafter referred to

or to file a bill of particulars with respect thereto, and respectfully shows to the Court as follows, to-wit:

1.

Plaintiff alleges himself to be a contract carrier operating under a permit granted by the Railroad Commission of Texas, numbered 11449, dated July 9, 1941, authorizing him to transport goods, wares and merchandise, including flour, feed and other mill and grain prod- [fol. 11] ucts, for defendant, General Mills, Inc., from its mill located at Wichita Falls, Texas, to points and places within a radius of one hundred miles thereof, excepting certain highways therein mentioned, a copy of which permit is attached to the amended bill of complaint. Plaintiff further avers that he did transport numerous shipments for defendant pursuant to said permit and pursuant to an alleged contract between plaintiff and defendant, a copy of which is attached to the amended complaint and marked Exhibit A, which said purported contract contains, among others, the following clause:

"It is mutually agreed between the parties that the rate to be charged by the First Party and paid by the Second Party for the services contemplated to be rendered as provided in this contract, shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

Plaintiff avers that he was paid by the defendant transportation charges aggregating $44,803.33, whereas he alleges he should have been paid $77,814.98 under applicable tariffs of the Railroad Commission and he claims that Tariff 1-A issued by the Railroad Commission of Texas is the applicable tariff and in Paragraph V of the amended complaint it is alleged by plaintiff that such Tariff 1-A was issued by the Railroad Commission of Texas pursuant to Section 6aa, Article 911b, Vernon's Annotated Civil Statutes of Texas. The authority conferred upon the Commission under said Section 6aa of Article 911b is the only authority granted by the laws of this state to the Railroad Commission to fix rates, fares and charges

[fol. 12] of contract carriers or to prescribe rules and regulations covering rates, fares and charges collected by contract carriers in this state, said article of the statute reading as follows:

"Sec. 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

This article of the statute authorizes the Commission to fix minimum rates, fares and charges to be collected by contract carriers when and only when such contract carriers are operating in competition with common carriers and performing substantially the same service as common carriers. Absent either of these requirements the Commission is powerless to require contract carriers to observe minimum rates, fares and charges fixed by the Commission. It is alleged in Paragraph V of the amended complaint that the tariff of the Commission on its face makes the rates therein published applicable to "contract motor carriers, as minimum, on Texas intrastate traffic, unless permit issued by the Commission provided to the contrary." It is then alleged that contract carrier permit No. 11449, issued to plaintiff, contains *no contrary provision* but that the order of the Commission granting the permit "specifically calls attention to the rate requirements of the law and of the Commission." It is then alleged:

[fol. 13] *"By the aforesaid orders of the Railroad Commission said Commission, to whom is committed the original exclusive jurisdiction to determine all questions of competition and the substantiality of service, has determined such question and has fixed a schedule of minimum rates to be observed by contract carriers and shippers alike."*

There are no allegations in the amended complaint to the effect that the transportation services rendered by plaintiff to defendant competed with or were in competition with common carriers and there are no allegations

that the services rendered by plaintiff were substantially the same as services rendered by common carriers. Nor are there any allegations showing or tending to show wherein competition, if any, existed between plaintiff and with common carrier or carriers and with what common carrier or carriers or wherein the services rendered by the plaintiff constituted substantially the same service as that of any other common carrier or with what common carrier or carriers. The orders of the Railroad Commission and the permit issued to plaintiff, copies of which are annexed to the amended complaint, and the tariffs of the Commission, copies in part of which are annexed to the amended complaint, make no finding that competition existed between the plaintiff and any common carrier or carriers with respect to the transportation services authorized in the permit or that such service or services were substantially the same as those rendered by any common carrier. On the other hand, the order of the Commission (annexed to the amended complaint) negatives the idea that the transportation services authorized by the permit of the Commission to be performed competed with services performed by any common carrier or carriers and likewise negatived the fact that the services authorized to be performed by plaintiff were substantially similar to the services performed by any common car-
[fol. 14] rier or carriers. The allegations contained in the amended complaint to the effect that the Railroad Commission has determined competition and substantiality of service are a conclusion of the pleader, not supported by any allegations of fact, and are in fact contrary to the recitations shown on the face of the documents issued by the Railroad Commission, copies of which are annexed to the amended complaint or made a part of the complaint by reference. Even if the order of the Commission granting the permit to plaintiff and the permit itself be construed as constituting a requirement that the plaintiff charge defendant and that defendant pay the rates prescribed in Tariff 1-A, referred to in Paragraph V of the amended complaint, as a minimum, still, nevertheless, such order and requirement of the Railroad Commission are void, illegal and of no force and effect under the allegations contained in the amended complaint and the exhibits attached thereto for the following reasons, to wit:

(a) Because such order or requirements is without warrant of law and beyond the powers, authority and jurisdiction of the Railroad Commission of Texas;

(b) Because there is no finding of the Commission alleged or set forth in support of said order or permit or contained therein to the effect that the services authorized by the order and permit or the services actually performed by plaintiff were in competition with the services performed by any common carrier or that such transportation services authorized or rendered were substantially the same as those rendered by any common carrier. Therefore, under Section 6aa, Article 911b, Vernon's Annotated Civil Statutes of Texas (the only statutory authority of the Commission to fix minimum rates for contract carriers), the Commission was without authority or power to fix [fol.15] or require the observance of minimum rates.

(c) Because such order and requirement, if any, are arbitrary, unreasonable and do not appear to be supported or founded upon fact.

(d) Because such order and requirement, if any, violate the right of private contract in contravention of the Constitutions of the State of Texas and the United States of America.

(e) Because it does not appear that defendant had contracted and agreed to pay to plaintiff the rates and tariffs alleged to have been prescribed and required by the order and permit.

It will not be presumed, in the absence of an affirmative showing, that facts existed, or were proven to the Railroad Commission of Texas to exist, as would authorize it to fix minimum rates and it cannot be presumed (from the mere fact that it specified minimum rates should be observed) that the Commission found competition and substantiality of service to exist or that substantiality of service and competition with common carriers did in fact exist. Therefore, the allegations contained in Paragraph V of the amended complaint to the following effect:

"By the aforesaid orders of the Railroad Commission said Commission, to whom is committed the original exclusive jurisdiction to determine all questions of competition and the substantiality of service, has determined such

question and has fixed a schedule of minimum rates to be observed by contract carriers and shippers alike," are [fol. 16] mere conclusions of the pleader, without facts supporting such conclusions, and seek to invoke a presumption of validity in the absence of facts, which is not proper and which cannot be invoked with respect to the orders, tariffs or requirements, if any, of the Commission as aforesaid. Such allegations are improper and cannot be made in lieu of allegations of fact showing authority of the Commission to fix minimum rates applicable to the transportation services involved herein under Section 6aa, Article 911b, Vernon's Annotated Civil Statutes of Texas.

The allegations in the amended complaint to the effect that defendant was required to pay the lawful rate of $77,814.98, plus transportation tax, instead of the amount paid and collected, and that defendant is obligated to plaintiff for the difference between the alleged legal rate and the amount paid and collected, are predicated soley upon the alleged Tariff 1-A and the alleged orders and requirements of the Commission hereinbefore referred to and therefore constitute an unwarranted and improper conclusion on the part of the plaintiff for the reason hereinabove stated.

Wherefore, premises considered, defendant prays that the allegations in the amended complaint (1) to the effect that defendant is indebted to plaintiff for the difference between the alleged lawful rate of $77,814.98, plus transportation tax, and the amount paid by defendant and collected by plaintiff, (2) to the effect that the rates and tariffs prescribed in Railroad Commission Tariff 1-A are applicable to the shipments herein involved and the transportation services rendered by plaintiff to defendant, and (3) the allegations to the effect that such tariffs and rates were required under and made applicable by the orders and permit of the Commission to the transportation services involved, and (4) the allegations in the amended com- [fol. 17] plaint to the effect that the Railroad Commission has determined all questions of competition and substantiality of service and has determined and fixed a schedule of minimum rates to be observed by contract carriers and shippers alike, and each of them, be in all things stricken.

2

In the alternative, and only in event its motion to strike contained in the above and foregoing numbered paragraph be overruled, defendant says that plaintiff should be required to make a definite statement or furnish a bill of particulars with respect to the following matters so as to enable defendant to properly prepare an answer in this case and to properly prepare for a trial of the issues involved:

(1) If the operations of plaintiff competed with the operations of any common carrier or carriers and, if so, (a) which of the operations by plaintiff competed with the operations of a common carrier or carriers and (b) with what common carrier or carriers.

(2) If the service or services performed by plaintiff for defendant were substantially the same as service or services performed by common carriers and, if so, (a) which of the service or services performed by plaintiff were substantially similar to services performed by a common carrier or carriers and (b) what common carrier or carriers performed substantially the same service.

(3) A full statement of all facts surrounding the operations and services performed by plaintiff and authorized to be performed under its permit from the Railroad Commission, and if it is claimed that such operations competed with any common carrier or carriers or that if such [fol. 18] services were substantially similar to the services performed by any common carrier or carriers then a full and detailed statement of the operations of the alleged competing common carrier or carriers and a full statement of the services performed by any common carrier or carriers alleged to be substantially similar to the services performed by the plaintiff.

It is also material for this Court and for defendant to know plaintiff's contention with respect to the matters above set out in order that the validity and applicability of the tariffs and the required observance, if any, thereof, be determined.

Wherefore, premises considered, defendant alternately prays that plaintiff be required to make definite state-

ment with respect to the matters hereinabove set forth or furnish a bill of particulars with respect thereto.

3

In Paragraph V of the amended complaint the following allegations are found:

"Complainant further alleges that when his application for a contract carrier permit authorizing him to serve defendant alone as a contract carrier was heard before the said commission that he appeared at said formal hearing and that there appeared with him one Mr. McCraney, Traffic Manager for defendant at defendant's offices in Oklahoma City, Oklahoma, said McCraney being an agent and representative of defendant; that Mr. McCraney testified under oath before the Railroad Commission in support of said application and on behalf of General Mills, Inc.; that if defendant is not bound by the rates fixed and prescribed by the Railroad Commission of Texas as [fol. 19] a matter of law that in such event that complainant and defendant agreed by paragraph 13 of their contract as filed with said Commission, Exhibit "A" hereof, to be bound by the rates as fixed and prescribed by said Commission and defendant is now estopped to question said rates in any respect."

The substance of the testimony of McCraney is not set forth in the complaint and as a matter of fact no information is given at all with respect to what McCraney testified to. The mere fact that he was present at the hearing and gave testimony upon some matter before the Commission does not estop this defendant to question the applicability or validity of any rates of the Commission. Furthermore, Paragraph 13 of the contract annexed to the complaint would not preclude and does not preclude defendant from challenging the validity or applicability of any rates or tariffs of the Commission nor would it prevent plaintiff and defendant from making such other agreement and arrangement with respect to the tariffs and charges for any particular shipment they might choose, particularly so long as such shipment or the services rendered in connection therewith were not in competition with the operation of any common carrier or carriers or that such services rendered in connection with such shipment were not substantially the same as the services rendered by any common carrier

or carriers. The allegations are nothing but unwarranted conclusions, unsupported by facts, are prejudicial, immaterial and should be stricken.

Wherefore, premises considered, defendant prays that the above quoted allegations and each and all of them be stricken.

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In the alternative, and only in event the motion to strike contained in paragraph numbered 3 hereof be overruled, [fol. 20] defendant says that it nowhere appears what testimony was given by McCraney before the Railroad Commission or how and in what way such testimony would estop defendant from questioning the validity or applicability of any rates of the Commission or relieve plaintiff from establishing the applicability or validity thereof. No attempt is made to quote any part of the testimony given by McCraney or to give the substance thereof. Before defendant can answer these allegations it is necessary to know what testimony was given by McCraney which it is claimed constitutes an estoppel and how plaintiff claims such testimony will constitute an estoppel. Defendant is left entirely in the dark as to what it is claimed McCraney testified to and what conduct on his part before the Commission it is claimed constitutes an estoppel. It is necessary that defendant have this information before it can properly answer and prepare for trial and it is necessary for the Court to have this information before it can pass upon the alleged estoppel sought to be interposed by the above and foregoing allegations.

Wherefore, premises considered, defendant prays that plaintiff be required to make a full and definite statement or furnish a bill of particulars with respect thereto, showing what testimony or conduct on the part of McCraney is relied on as constituting an estoppel, what McCraney did and what he testified to, which plaintiff claims constitutes an estoppel in this case.

Wherefore, premises considered, defendant prays that the Court entertain this motion to strike and, in the alternative, for a more definite statement of plaintiff's allegations or for a bill of particulars with respect thereto, and that the Court upon hearing sustain said motion and strike the portions of the complaint complained of, or, in the alternative, require plaintiff to furnish a full and more

[fol. 21] definite statement with respect to the matters set forth in said motion or furnish a bill of particulars with respect thereto, and that defendant be given such other relief as it may be entitled to, including the right to postpone its answer until its motion as aforesaid is acted upon and determined by the Court or until such further time as the Court may order and direct.

Miley, Hoffman, Williams, France & Johnson, First National Bank Building, Oklahoma City, Oklahoma; Cantey, Hanger, McMahon, McKnight & Johnson, By Alfred McKnight, Attorneys for the Defendant, General Mills, Inc. 1500 Sinclair Building, Fort Worth 2, Texas.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed April 13, 1944

[Title omitted]

Plaintiff in his complaint, and exhibits attached thereto, shows that in June 1941 he procured a permit from the Railroad Commission of Texas, specifically authorizing him as a contract motor carrier, as follows:

"To transport goods, wares and merchandise, including flour, feed and other mill and grain products, for General [fol. 22] Mills, Inc., from their mill located at Wichita Falls, Texas, to points and places within a radius of 150 miles thereof; and from its mill located at Amarillo, Texas, to points and places within a radius of 150 miles thereof, and from such points and places within the radius described to the mill located within the radius, and using for said operation twelve trucks, but the applicant is prohibited from transporting the above commodities over the following restricted highways", naming certain highways.

Plaintiff alleges said certificate was duly executed by the Commission after a hearing in accordance with the law; that he hauled such goods as were specified for the defendant from the 1st day of August, 1941 to November 1, 1943; that the rates charged by him were those rates which had been duly prescribed by the Commission for the kind of services performed by him; that defendant

was due him for such hauling during that period, $57,814.98, Federal transportation taxes, etc., but that defendant paid him only the sum of $44,803.33, leaving a balance of $33,390.99, with legal interest, etc., for which he sues. Plaintiff attaches to his amended complaint, a statement of his charges covering the goods hauled, the origin, destination, and the amount of each individual charge covering the entire period of his services.

Such amended complaint was filed February 21, 1944. Defendant has not filed an answer, but on the 13th day of March, filed a motion to strike, and, in the alternative for Bill of Particulars. These motions were submitted to me recently on oral arguments and briefs. As I view the matter, defendant's motion to strike, considered in its entirety, goes to the right of the plaintiff to recover at all upon his complaint. Plaintiff's counsel announced on the occasion of the oral argument that plaintiff was willing to stand, recover or not, upon his amended complaint, to [fol. 23] which defendant's motion to strike is directed. In the event of trial, plaintiff will have no right to introduce evidence, other than in support of his cause of action as he pleads it. If the evidence so offered is legally insufficient, defendant could raise these identical questions, when plaintiff should rest his case, by a motion for judgment.

I am, therefore, overruling the motion to strike with the reservation that, these questions will then be passed upon. It would seem this course would be to the advantage of all concerned. Certainly it would make more than one appeal less likely, in order to reach a final judgment. Defendant's position now is that plaintiff's complaint is insufficient to entitle plaintiff to recover. Plaintiff's position is that it is legally sufficient and, if given the opportunity, he is going to trial upon it. I see no difference in the questions that would be there presented, and the questions that are here presented. In the event of an appeal, the Court could fully dispose of the case. On the other hand, if defendant's motion here was sustained, it might result in two appeals before the matter could be finally disposed of.

In the alternative in its motion, defendant moves the Court to require plaintiff to furnish certain particulars, or to make a more definite statement in his pleadings which would have the effect to cover such particulars as

are sought from plaintiff. Such motion will be overruled. Though not expressly pleaded, much can be fairly inferred, because of the very nature of the business, and the relations to it of the respective parties, as revealed by the complaint and motions. It appears in every instance where particulars are called for that all of the information sought to be elicited, is equally as available and equally as accessible to the defendant as it is to plaintiff. Some of it relates to public records and proceedings. In one [fol. 24] instance, the defendant would require plaintiff to plead the testimony given by one, McCraney, before the Railroad Commission of Texas, when plaintiff's contract carrier permit to carry goods for defendant, as above indicated, was being considered by the Commission. The plaintiff alleges in general terms that said McCraney testified before the Commission in support of plaintiff's application. If McCraney had not then been an employee of defendant in the capacity of its Traffic Manager, which he was, plaintiff could not be required to plead the evidence given by such witness. If his testimony is admissible in the nature of an admission by defendant, plaintiff could introduce any part of it that he might care for. Defendant might have the right then to introduce all of his testimony given on that occasion. I can conceive of no right in either party to plead his evidence, in order to make present or future pleadings more definite. Under such circumstances, it is sufficient for plaintiff to merely allege that McCraney's testimony was in support of his application. I am not here passing upon the effect of such testimony, nor conclusively, as to the admissibility of it.

Now as to the particulars sought by defendant, Sec. (1), Paragraph 2 of the alternative motion is rather typical of all. That section calls for this:

"(1) If the operations of plaintiff competed with the operations of any common carrier or carriers and, if so, (a) which of the operations by plaintiff competed with the operations of a common carrier or carriers and (b) with what common carrier or carriers."

It appears from the pleadings that defendant had mills both at Wichita Falls and Amarillo; that about 85 to 90 per cent of its carrier business was with common carriers, and comparatively little with contract carriers; such as

[fol. 25] plaintiff. It is not alleged and cannot be inferred that plaintiff kept up with, or was required to keep up with, his common carrier competitors, or whether his services were substantially similar to any common carriers with which he was competing. On the other hand, it does appear, and can be assumed, from the very nature of the transactions between these parties, as revealed in the pleadings, that whatever, whenever, and wherever plaintiff carried for defendant, it was all under the defendant's directions and orders; also that defendant has complete records revealing all of the information that it would have plaintiff produce by this motion. It is not alleged specifically, but can be fairly assumed that defendant, in view of its extensive business out of Wichita Falls and Amarillo, knew all about the competing carrier lines, common or contract, used by it, and has records covering same. Also whether plaintiff's services to defendant were substantially similar to services, at the same time, that were being performed for it, or for its competitors, by common carriers, are matters peculiarly within defendant's knowledge. On the other hand, in the very nature of plaintiff's business under this special contract, it cannot be assumed that such information as called for was within his special knowledge. Defendant would have plaintiff furnish a detail of the services performed by common carriers, with which he might have been in competition. Under plaintiff's authority, as a contract carrier, I see nowhere in the law submitted that any such duty is imposed. I cannot conceive of how plaintiff could furnish such information if the Court required him to do so. Certainly not without such delays and expense as to practically deny him the right to try his case.

I cannot, in advance of the trial, pass upon the admissibility of any evidence that may be tendered upon the trial. If records or testimony of witnesses, revealing such [fol. 26] information, as defendant here seeks, is admissible as having legitimate bearing upon the decision, defendant may introduce them.

Defendant will be required to answer plaintiff's pleadings as they stand. The parties may see if they can agree upon a date for the filing of an answer herein. If not, I will hear and pass upon the matter.

An order may be drawn in accordance herewith.

James C. Wilson, United States District Judge.

April 13, 1944.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEFENDANT'S MOTION TO STRIKE AND TO MAKE MORE DEFINITE AND CERTAIN—Filed April 20, 1944

[Title omitted]

Be It Remembered that on the 24th day of March, A. D. 1944, came on for argument before and consideration by the Court the defendant's motion to strike and/or to require the plaintiff to make more definite and certain the allegations of his amended bill of complaint, filed herein on the 13th day of March, 1944. Such motion, together with briefs, was taken under advisement by the Court until April 13, 1944, at which time the Court filed a memorandum opinion with respect thereto.

[fol. 27] For the reasons stated in said memorandum opinion the Court finds that the motion as aforesaid should be overruled with the reservation set forth in said opinion.

Accordingly, It Is Ordered, Adjudged And Decreed that the motion of defendant, General Mills, Inc., as aforesaid to strike and/or to require plaintiff to make more definite and certain the allegations of his amended bill of complaint, be and the same is hereby overruled, with the reservation stated in said memorandum opinion, to which defendant excepts.

It is also ordered that defendant file its answer to said amended bill of complaint on or before May 1, 1944, and the time in which defendant may answer plaintiff's demands for admission filed herein on March 13, 1944, is also extended to the extent that defendant's reply to said demand may be filed on or before May 1, 1944.

Dated at Fort Worth, Texas, this the 20 day of April, A. D. 1944.

James C. Wilson, United States District Judge.

Approved. Cecil Morgan, T. S. Christopher, Attorneys for plaintiff.

In United States District Court

Plaintiff's Motion for Summary Judgment and Supporting Affidavit—Filed May 6, 1944

[Title omitted]

To Said Honorable Court:

Complainant, Leo H. Steele, moves for summary judgment in his favor and files herewith supporting affidavits [fol. 28] to be considered along with demands for admissions heretofore made upon defendant and defendant's answers thereto as well as the pleadings and says he is entitled to judgment as a matter of law because:

(1) Complainant is a contract carrier operating a contract motor carrier service subject to the provisions of Article 911 b Vernons Annotated Civil Statutes of Texas, and subject to the jurisdiction of the Railroad Commission of Texas, such operation being carried on pursuant to authority contained in Railroad Commission of Texas Contract Carrier Permit No. 11449.

(2) At all times relevant to this proceeding the Railroad Commission of Texas had fixed and prescribed as it was authorized to do under Section 6aa of Article 911 b, Vernons Annotated Civil Statutes of Texas 1925, and there existed a fixed and prescribed schedule of minimum rates which a contract carrier was required to charge and which a shipper was required by law to pay.

(3) All of the shipments and the weights thereof, shown in Exhibit "F" were shipped by defendant on the motor trucks operated by complainant pursuant to authority of contract carrier permit No. 11449 from origins and to destinations as shown, and the minimum rates shown in said exhibit theretofore fixed by the Railroad Commission of Texas were required to be paid by defendant to complainant as a matter of law.

After the expiration of the ten days from service of this motion on defendant and on the 17th day of May, 1944, or as soon thereafter as the time of the Court will permit, plaintiff prays that, on the pleadings, depositions

(if any) admissions and affidavits on file, the Court render [fol. 29] summary judgment in favor of plaintiff and against defendant for the amount sued for.

Culbertson, Morgan, Christopher & Bailey, By (Signed) T. S. Christopher (T. S. Christopher), Attorneys for Complainant. 806 First National Bank Building, Fort Worth, Texas.

NOTICE

To General Mills, Inc., defendant, or Cantey, Hanger, McMahon, McKnight and Johnson, Attorneys of Record:

You will take notice that complainant has filed a motion for Summary Judgment, with accompanying affidavits, true copies of which are served on you herewith, and, after the expiration ten days from this service on you and on the 6th day of May, 1944, or as soon thereafter as the time of the Court will permit, the complainant will press said Motion for hearing under Rule 56, Federal Rules of Civil Procedure, at Fort Worth, Texas.

Culbertson, Morgan, Christopher & Bailey, by (Signed) T. S. Christopher, (T. S. Christopher), Attorneys for Complainant.

806 First National Bank Building, Fort Worth, Texas.

[fol. 30] Served on this 6th day of May, 1944, by personally delivering a copy of Motion and Affidavits to Cantey, Hanger, McMahon, McKnight and Johnson, Sinclair Building, Fort Worth, Texas, defendant's attorneys of Record.

(Signed) T. S. Christopher (T. S. Christopher), Attorney for Complainant.

Copy received. Warren Scarborough.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEO H. STEELE ON MOTION FOR SUMMARY JUDGMENT

[Title omitted.]

Before me the undersigned authority, a Notary Public in and for Tarrant County, Texas, on this day personally

appeared Leo H. Steele, who being duly sworn on his oath says:

I am Leo H. Steele, the Complainant in the above entitled and numbered proceeding. I live in Wichita Falls, Wichita County, Texas where I have resided for a period of approximately three and one-half years. I am 36 years old; and I make this affidavit from my own personal knowledge.

The Defendant, General Mills, Inc. is, within my knowledge, a Delaware corporation and has a corporate permit to do business within the State of Texas and does do business in the State of Texas, operating a large mill at Wichita Falls and one at Amarillo, Texas. At these mills grain is processed into flour, meals, cereals, feed and other grain products. These various products are sold and distributed in Texas and elsewhere.

[fol. 31] In August of 1940 I entered into a written contract with General Mills, Inc. to transport and deliver products tendered for shipment by General Mills, Inc. according to its requirements and to such consignees or places in the State of Texas as General Mills, Inc. should designate. At that time (and for many years before) I was employed by General Mills, Inc. and I entered into the contract and filed the application with the Railroad Commission of Texas at the request of said company officials.

At the time of entering into said contract both myself and General Mills, Inc., acting through its Vice President, J. S. Hargett and its former Traffic Manager, H. McCraney, and L. B. Colfix, Comptroller for General Mills, Inc., knew that I would be required to obtain a contract carrier permit from The Railroad Commission of Texas. Each of us knew, and were advised, that the application to the Texas Railroad Commission was required to be accompanied by the contract between the parties. Accordingly the contract was reduced to writing signed by myself and General Mills, Inc., by J. S. Hargett, Vice President.

This contract was presented to my attorneys by myself and Mr. L. B. Colfix of General Mills, Inc., who came to Fort Worth to my attorneys' offices at the expense of General Mills, Inc. for the purpose of having the application filed with the Railroad Commision. We were advised that the contract would not do because of the provision therein for the rates to be paid and that it would be necessary that

the contract provide for the payment of rates as prescribed by the Railroad Commission but that the application could be filed and the contract between the parties filed as a part thereof later.

[fol. 32] An application was filed with the Railroad Commission of Texas. The contract as attached to the application was actually signed and filed with the application as a part thereof about the 18th or 19th of April 1941. A photostatic copy of the application, including the contract as filed with said Commission, is attached hereto marked "Exhibit J."

This application was set for formal hearing before the Railroad Commission in Austin, Texas sometime in November or December of 1940. Mr. H. McCraney went to said hearing in Austin, Texas at the expense of General Mills, Inc. and testified before said Commission in support of the application. A further and final hearing was held before said Commission on May 2, 1941. Finally on June 16, 1941 the Railroad Commission of Texas entered an order authorizing the granting of the permit. The copy of that order attached to the bill of complaint as "Exhibit B" is a true copy of said order. And finally on July 9, 1941 said Commission issued to me contract carrier permit No. 11449. The copy of said permit attached to the bill of complaint as "Exhibit C" is a true copy of the original in my possession.

Soon after I received the order of the Railroad Commission granting the contract carrier permit, and the contract carrier permit, I showed each of them to Mr. H. McCraney and Mr. L. B. Colfix, representatives of General Mills, Inc. at their Oklahoma City Office. However, I do not remember the exact date, but I am reasonably sure that it was sometime just before I started actual operations on August 1, 1941. However, it could be possible that it was after August 1, but if it was after August 1, 1941, it was only a very few days thereafter. I am almost positive that it was prior to the actual start of my actual operations as a contract [fol. 33] carrier for General Mills. The Oklahoma City office of General Mills, Inc., controls all business operations of the mill at Wichita Falls, Texas.

Thereafter and on the first day of August 1941 I began to transport such commodities as were tendered to me for transportation on my trucks and to deliver such commodities for General Mills, Inc. to such consignees and to such

places in Texas as General Mills, Inc., directed. I regularly and continuously transported such commodities in such manner and from said date until to and through October 31, 1943.

I personally prepared "Exhibit F" attached to the First Amended Original Bill of Complaint. Said "Exhibit F" is a true and correct statement of:

(1) The date of each shipment tendered to me by General Mills, Inc. for transportation.

(2) A true statement of General Mills, Inc. invoice number on each such shipment.

(3) The kind of commodity transported.

(4) The point of origin.

(5) The destination.

(6) The weight of each such shipment or combination of shipments where the shipment would move under the grocery mixture rate. The weight of individual shipments by invoice number not being shown where the Grocery mixture rate, as prescribed by Railroad Commission of Texas, Motor Freight, Class and Commodity Tariff No. 1A should be applied because the rate is not governed by weight of individual shipment but by number of consignees and total [fol. 34] weight. The grocery mixture rate is prescribed by Item No. 875 of said Railroad Commission tariff and among other things provides:

"(2) Shipments must be billed from one consignor at one point of origin at one time (see Note 1) on one or more bills of lading (see Note 2) to five or less consignees (see Note 3) at one destination, and when consigned to more than one consignee freight charges must be prepaid.

Note 1—The term 'at one time' as used in this paragraph means that a shipper must tender to a carrier, in order to avail himself of the rates set out in this regulation, a complete grocery mixture shipment at one calling of the dray truck (or other conveyance used by carriers for the reception of freight). This note should not be construed as prohibiting carriers' draymen from making (for carriers' convenience only) two or more trips to a business house for the purpose of picking up a complete grocery mixture shipment.

Note 2—When more than one bill of lading is used, shipper must indicate on each bill of lading words to the effect that the shipment covered thereby is a part of a complete grocery mixture shipment which is being tendered at the same time.

Note 3—Shipments may be billed to six or more consignees, subject to an increase of 100 pounds in the minimum weight for each consignee in excess of five."

(7) The rate as prescribed by the Railroad Commission of Texas in its Motor Freight Class and Commodity Tariff No. 1A.

[fol. 35] (8) The consignor, which in all instances is General Mills, Inc.

(9) The names of consignees are not shown because General Mills, Inc. has all the original invoices in its possession and refuses to deliver all or any of them to complainant.

(10) The entire total charges by months when the rate prescribed by the Railroad Commission of Texas in Motor Freight Class and Commodity Tariff No. 1A is applied.

(11) The total amount of Federal Transportation Tax for all months after said tax became effective.

(12) Total amounts paid to complainant by General Mills, Inc. by months.

(13) Total amounts by months of the difference, when rates prescribed in Class and Commodity Tariff No. 1A are applied, and the amount paid me by General Mills, Inc.

(14) A summary showing total charges based upon Class and Commodity Tariff No. 1A rates; total amounts paid me by General Mills, Inc.; Federal Transportation tax; and the difference between such total charges and the amounts paid.

In preparing "Exhibit F" I used Fourth Class, any quantity rates, the grocery mixture rate, 500 pounds minimum, and the column 60 rates for glassware. The Traffic Department of General Mills, Inc. had furnished its Wichita Falls office with a statement of these rates in cents per hundred pounds, except the Column 60 rates "Exhibit K" attached hereto is a true copy of said rates as applied

[fol. 36] between points and as furnished by General Mills, Inc., Traffic Department to its Wichita Falls office, except Column 60 rates, glassware. I have supplied the Column 60 rates on glassware on said exhibit. I have verified all of the rates shown both in "Exhibit F" attached to the amended bill of complaint and "Exhibit K" attached hereto and all rates so shown on each exhibit are the correct rates as prescribed by the Railroad Commission of Texas in Class and Commodity Tariff No. 1A.

Applying the aforesaid rates as used by me and as fixed by the Railroad Commission of Texas in its Motor Freight Class and Commodity Tariff No. 1A, General Mills, Inc. is indebted to me for transportation as a contract carrier, operating intrastate in Texas subject to the jurisdiction of the Railroad Commission under contract carrier permit No. 11449, in the total sum of thirty-three thousand three hundred ninety dollars and ninety-nine cents ($33390.99) all as shown by aforesaid "Exhibit F."

Affiant says that he is thoroughly familiar with the operations of the common carrier motor freight lines operating into and out of Wichita Falls, Texas and elsewhere, first by reason of observation of those operations for a number of years prior to his having obtained contract carrier permit No. 11449, during about eight years of which time affiant says that he was managing the private truck operations of the defendant, General Mills, Inc.; second, by reason of the fact that such common carrier operations come under his direct observation throughout the period of his operating under aforesaid contract carrier permit, and third, by reason of the fact that he has now been employed by and worked for Miller and Miller Motor Freight Lines, a common carrier motor carrier operating into and out of Wichita Falls, Texas for a considerable period of time.

[fol. 37] Affiant says that of his personal knowledge that it is an absolute fact that all the common carrier motor carriers operating into and out of Wichita Falls, Texas (and elsewhere) operate the same kind of trucks which he operated as a contract carrier and more particularly in this:

That he operated International, Dodge and White trucks. That each and every one of the Common Carriers operating into and out of Wichita Falls operated the same kind of trucks and even the same make of trucks, and same size. That there are various manufacturers brands of trucks,

such as International, Dodge, GMC, White, Ford, etc. but that all are constructed along the same principal order and design and designed to serve the same general purposes.

That he operated trucks constructed as a single unit, that is the power unit and bed or body mounted on a single frame and commonly called, in the motor carrier industry, "bob-tails." That all the common carriers operating into and out of Wichita Falls also operated "bob-tails" or trucks constructed as a single unit.

That in addition thereto the common carriers operated what is called tractor-trailer units, that is where the power unit is built in one piece and the trailer body (or loading unit) is built in another piece and these units are coupled together to enable the thus combined units to transport a load.

That the purpose and design of the trucks whether as a single unit or as a combination of units is for the same purpose, that is to transport physical properties from place to place.

[fol. 38] That the bodies of the trucks, whether such bodies were built as a part of a single unit vehicle or as a part of a combination unit are built along the same general designs and are commonly called Vans. That some such body units are built with closed roofs or tops and some without such tops. That where they are built without the closed tops that tarpaulins are used over the tops to make a closed body or Van.

Affiant says that he used the open top bodies with tarpaulins. That all of the common carrier motor carriers operating into and out of Wichita Falls used exactly the same kind of bodies or Vans. That in addition the common motor carriers used the closed top Van. That said bodies are designed to and do serve the identical same purpose in the transportation of physical properties.

Affiant says that in transporting the commodities or property of General Mills, Inc. that his trucks loaded at the docks of General Mills, Inc. and that the trucks of the common carrier motor carriers, such as Sproles Motor Freight Lines, Inc., Miller and Miller Motor Freight Lines, Tarry Motor Freight Lines and others, loaded at the very same docks. That frequently affiant's trucks sat alongside the trucks of some of the common carrier motor carriers at the same docks and each were being loaded at the same

time with the same identical kinds of commodities and in identically the same manner.

That affiant transported the products of General Mills, Inc. from and to Wichita Falls, Texas and that the common carrier motor carriers transported identically the same kind and character of commodities from and to Wichita Falls.

[fol. 39] That affiant made his truck available to General Mills, Inc. at any hour of the day or night for transportation of the property and products of General Mills, Inc. in truck load, or substantial truck load, quantities and that the common carrier motor carriers made their trucks available to General Mills, Inc. at any hour of the day or night for transportation of the same kind of commodities and property in truck load or substantial truck load quantities, this being a service rendered by all the common carrier motor carriers at Wichita Falls, and elsewhere, known as "call-and-demand" service.

That affiant transported commodities and property of General Mills, Inc. in less-truck-load quantities but only when a sufficient number of such shipments were tendered over such period of time as to make him a truck-load; that the common motor carriers rendered a service on less-truck-load and picked up these less-truck-load shipments at any hour of the day and sent them on out to destination on one of the many regular scheduled trucks operated by said common motor carriers without waiting for a truck load of such shipments to be tendered by General Mills, Inc. That it frequently happened that these less-truck-load shipments, of the identically same kinds of commodities were being loaded on affiant's trucks and on the trucks of the common motor carriers at the same docks, at the same time.

Affiant says that his trucks were operated over the same highways and at the same time and under the same road conditions as the common motor carriers operated.

Affiant says that his trucks were operated between the same origin and destination points in the transportation of the products of General Mills, Inc. within the terri-[fol. 40] tory covered by his permit as the trucks operated by the common motor carriers.

Affiant says that he gave so-called store-door delivery, that is he delivered the products of General Mills, Inc. at the store or other place of business of the consig-

nee and that all of the common motor carriers gave identically the same service in that all of the common motor carriers made and make delivery at the store or other place of business of the consignee.

Affiant states that during the time that he was transporting commodities for General Mills, Inc. that he did not haul any commodity to or from General Mills, Inc. at Wichita Falls that was not also hauled to or from General Mills, Inc. at Wichita Falls by the common carriers, both rail and truck.

Affiant further says that Wichita Falls, Texas is served by various railroads and that the railroads carry all commodities of every character and description. That the railroads perform a pick-up and delivery service in Wichita Falls whereby shippers within the corporate limits of said city may and do have their shipments in less-car-load quantities picked up at the shippers dock or place of business and delivered to the consignees store or other place of business within the corporate limits of the point of destination. The railroads perform both the pick-up and the delivery service by the use of trucks. After a shipment is picked up by the railroad's pick-up and delivery truck service it is loaded in a railroad car and delivered to point of destination. There it is taken off the railroad car and delivered to the consignees store door or other place of business in a truck. The railroads in performing this service pick up shipments at identically the same places and deliver them at identically the same places as [fol. 41] common carrier motor carriers and contract motor carriers pick up and deliver such shipments.

Affiant says that the railroads pick up and delivered shipments for General Mills, Inc. and of the very same kind of commodities as affiant was hauling for General Mills, Inc. and between many of the very same origins and destinations during all of the time that affiant was hauling for General Mills, Inc.

Affiant further says that there is either rail or common carrier truck line service, or both, to every point to which he ever hauled a shipment except to the country communities or stores as follows: Blue Grove, Charlie, Gilliland, Paradise Valley, Punkin Center and Vasbti.

Affiant says that he hauled commodities for General Mills, Inc., to the following cities and towns where there is both common carrier motor carrier service and rail-

road service and where there is both common carrier motor carrier and railroad pick-up and delivery service and that this service is both from and to Wichita Falls, Texas: Alvord, Audrey, Abilene, Archer City, Anson, Albany, Bowie, Breckenridge, Burkburnett, Bomarton, Brownwood, Byers, Bryson, Bonham, Bonita, Baird, Ballinger, Bellvue, Brashear, Chico, Crowell, Comanche, Cisco, Commerce, Colorado City, Cleburne, Cooper, Celest, Denton, Dallas, Dundee, DeLeon, Dublin, Dennison, Electra, Eastland, Fort Worth, Farmersville, Gainesville, Goree, Grapevine, Graham, Gorman, Greenville, Haskell Holliday, Henerritta, Hamlin, Honey Grove, Iowa Park, Jacksboro, Knox City, Lawn, Ladonia, Leonard, Munster, Mankins, Munday, Mineral Wells, Merkel, McKinney, Mt. Vernon, Nacova, Newcastle, O'Brien, Olvey, Pilot Point, Petrolia, Paducah, Paris, Ranger, Rochester, Roscoe, Rising Star, Rotan, Seymour, Stephenville, Strawn, Sanger, Stamford, Sweetwater, Santa Anna, Snyder, St. Jo, Sulphur Springs, [fol. 42] Throckmorton, Truscott, Thornberry, Terrell, Tioga, Tuscola, Trenton, Valley View, Vernon, Whitesboro, Weatherford and Winters.

That he likewise handled commodities to the following cities or towns where there is both rail and common carrier motor service both to and from Wichita Falls, Texas, but no railroad pick-up and delivery service: Clara, Springtown and Windthorst.

That he likewise handled commodities to the following cities and towns where there is railroad service, both to and from Wichita Falls, Texas, and pick-up and delivery service but no common carrier motor line service: Petrolia and Rule.

That he likewise handled commodities to the following cities and towns where there is common carrier motor line service with pick-up and delivery service, both to and from Wichita Falls, Texas, but no rail service: Antelope, Benjamin, Blanket, Cross Plains, Clairette, Elbert, Jermyn, Lusk, Megargle, Scotland and Woodson.

Just as a single illustrative instance of affiant's contract carrier operations as compared with the operations of common carrier motor carriers and railroads affiant says that flour was loaded on his trucks at the docks of General Mills, Inc. and delivered to the place of business of the consignee in Fort Worth as an instance. That flour was loaded on the same kind of trucks of the com-

mon carrier motor carriers at the same docks of General Mills, Inc. at Wichita Falls and carried over the same highways and delivered to the place of business of the consignee in Fort Worth. The same was true of other commodities.

[fol. 43] The foregoing facts were true throughout the entire period August 1, 1941 to November 1, 1943.

Leo H. Steele.

Sworn to and Subscribed in my presence on this 6th day of May, A. D. 1944.

Doris Shrake, Notary Public in and for Tarrant County, Texas. (Seal.)

IN UNITED STATES DISTRICT COURT

ORDER POSTPONING TIME FOR FILING OPPOSING AFFIDAVITS BY DEFENDANT — Filed May 15, 1944

[Title omitted]

Upon motion made by defendant, which had been duly considered by the Court, it is Ordered:

1. That the Court will determine the necessity of defendant's furnishing, supplying and serving opposing affidavits to that filed by plaintiff, Leo H. Steele, in support of his motion for a summary judgment at the hearing on plaintiff's motion for summary judgment to be held on May 18, 1944.

2. That defendant need not supply, serve or furnish such affidavits until the Court determines the necessity therefor at the hearing as aforesaid and, if found necessary, such opposing affidavits may be filed, supplied and served within such period of time as the Court shall fix, determine and order at said hearing.

Done at Fort Worth, Texas, May 15, 1944.

James C. Wilson, United States District Judge.

[fol. 44] IN UNITED STATES DISTRICT COURT

DEFENDANT'S SUBMISSION OF OPPOSING AFFIDAVITS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed June 14, 1944

[Title omitted]

Defendant, General Mills, Inc., with leave of the Court, files herewith the affidavits of L. B. Colfix and Frank H. Cross as opposing affidavits to plaintiff's motion for a summary judgment and as opposing affidavits to the affidavit of plaintiff, Leo H. Steele, filed in connection with his motion for a summary judgment.

Respectfully submitted, Miley, Hoffman, Williams, Francé & Johnson.
Oklahoma City, Oklahoma.

Cantey, Hanger, McMahon, McKnight & Johnson, by Alfred McKnight, Attorneys for Defendant.
Fort Worth Texas.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF L. B. COLFIX IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT—Filed June 14, 1944

[Title omitted]

L. B. Colfix, having been first duly sworn, upon his oath deposes and says:

He is now and has been during all of the times named in this affidavit Comptroller of the Southwestern Division [fol. 45] of General Mills, Inc., defendant in the above-entitled cause. He is personally acquainted with the plaintiff, Leo H. Steele, and with the facts and circumstances connected with the contract carrier relationship between said Leo H. Steele and General Mills, Inc., and makes this affidavit of his personal knowledge of the facts stated.

The defendant, General Mills, Inc., owns and operates a flour mill at Wichita Falls, Texas, and one at Amarillo, Texas, as well as mills at other places. Grain is there processed into flour and other grain products, the principal product, however, being flour. Cereals are not made at the Wichita Falls mill.

For years prior to the making of the contract herein referred to with Leo H. Steele, General Mills, Inc., using its own trucks and drivers, had itself transported the shipments of the kind and character transported by Leo H. Steele pursuant to such contract. This was true not only in connection with the mill at Wichita Falls, Tex., but elsewhere, including Oklahoma. For a time Leo H. Steele, as an employee of General Mills, Inc., assisted in the conduct of its truck operations in Oklahoma and Texas. Early in 1940 General Mills, Inc., sold its trucks in Oklahoma to an independent motor contract carrier and contracted with such carrier on a cost plus basis for the transportation in Oklahoma of shipments which it had previously transported in its own trucks in such state. This greatly minimized the duties of Leo H. Steele, necessitating his transfer to a different department or line of work. He was told by General Mills, Inc., that if he so desired and obtained the necessary permit, the company would consider selling him its trucks then operating out of Wichita Falls, Texas, and perhaps Amarillo, Texas, and with respect to the trade territory served by the mills at such places, would endeavor to work out with him a transportation [fol. 46] contract similar to the contract made in Oklahoma, namely, on a cost plus basis. The proposal thus made was simply an offer and not a request.

General Mills, Inc., had nothing to do with the filing by Leo H. Steele of his application before the Railroad Commission of Texas for a contract carrier permit. It was not a party to the application and at no time entered an appearance of any kind in the proceedings. Steele employed lawyers of his own choosing without consulting General Mills, Inc., and assumed full responsibility for all that was done. No part of the cost or expense of procuring such permit was agreed to be paid or was paid by General Mills, Inc. Although Mr. H. McCraney, an employee of General Mills, Inc., may have appeared at one of the hearings before the Railroad Commission of Texas upon the application for the permit, he did so, not on behalf of General Mills, Inc., but simply in his individual capacity as a witness at the request of Leo H. Steele to testify to facts concerning which he had knowledge.

Affiant did not at any time go to Fort Worth, Texas, to the offices of the attorneys for Leo H. Steele for the pur-

pose of having Steele's application for a permit filed with the Railroad Commission, as is charged in the affidavit of Leo H. Steele filed in this case. Affiant is informed, as is also reflected by the exhibits to the pleadings herein, that the application of Leo H. Steele for a contract carrier permit was filed with the Railroad Commission of Texas on August 26th, 1940. The first time affiant was ever in Fort Worth to see Leo H. Steele or his attorneys was on April 11th, 1941, almost ten months after the filing of said application, which was for the purpose of coming to an agreement upon the terms of the proposed transportation contract which had not as yet been entered into, rather than anything to do with the filing by Leo H. Steele of his application for a permit.

[fol. 47] The first contract between Leo H. Steele and General Mills, Inc., a copy of which is attached to plaintiff's bill of complaint as Exhibit "A", although appearing to be dated August 26th, 1940, was not agreed upon, entered into, or executed until on or about the 17th or 18th day of April, 1941. At the time of the execution of the contract the date was left blank. It was later dated back to August 26th, 1940, at the instance and request of Leo H. Steele. The supplemental contract dated July 31st, 1941, a copy of which is attached to the answer of General Mills, Inc., filed in this case, marked "Exhibit 3" thereto, and which was in the contemplation of the parties at the time the first contract hereinabove referred to was made, was executed at or shortly prior to the time it shows to have been dated and before Leo H. Steele had transported any goods or commodities under either contract.

Throughout the negotiations between Leo H. Steele and General Mills, Inc., leading up to the making of said initial contract and supplemental contract, Steele through his attorneys, who represented themselves to be thoroughly conversant with the proposed operation and with the law of Texas applicable thereto, at all times assured General Mills, Inc., that although the initial or basic contract as a matter of uniform practice should provide that the rates charged shall be such as may be fixed by the Railroad Commission of Texas, nevertheless the Railroad Commission of Texas had not fixed rates applicable to the particular kind and character of service to be rendered under the contract, and that it was not only proper but

necessary that the parties by supplemental contract agree upon the rate of compensation to be charged for the services rendered The representations and assurances thus made are in part set out in the letters between the parties, true copies of which are marked "Exhibit 4" to "Exhibit 9," inclusive, attached to the answer of General Mills, [fol. 48] Inc., filed in this case, and were made to a greater extent and more in detail at the conference between affiant and plaintiff's attorneys in Fort Worth on April 11th, 1941, to which reference has before been made in this affiadvit. At such conference said attorneys discussed and pointed out to affiant wherein as a matter of fact the service to be rendered under the proposed contract was not in competition with or substantially the same as service rendered by common carriers, and wherein under the statutes and laws of Texas the rates, rules, and regulations prescribed by the Railroad Commission in its published tariffs were not applicable. It was with this understanding and to protect against an agreement to pay the generally prescribed rates applicable to common carriers, and to contract carriers in competition with and performing substantially the same service as common carriers, that General Mills, Inc., insisted that paragraph 13 of the initial contract executed April 17th or 18th, 1941, agreeing to pay such rates as may be fixed by the Railroad Commission of Texas, be expressly limited by the insertion therein of the phrase "for the kind and character of service to be rendered hereunder." Reference to the insertion in the contract of the phrase just quoted is made in affiant's letter to the attorneys for Leo H. Steele dated April 17th, 1941, a true copy of which is attached to the answer of defendant General Mills, Inc., herein, marked "Exhibit 9."

The representatives of General Mills, Inc., knowing that the services to be rendered by Leo H. Steele under the proposed contract were not in competition with nor substantially the same as services rendered by common carriers, in good faith made and executed the first contract in April, 1941, relying upon the representations and assurances of the attorneys for Leo H. Steele, and later entered into the supplemental contract of July 31st, 1941, wherein both Leo H. Steele and General Mills, Inc., agreed [fol. 49] that the Railroad Commission of Texas had not

fixed any rates, charges, or tariffs applicable to the kind and character of service to be rendered under the contract, and further agreed upon the rate of compensation to be paid therefor.

The amounts paid to Leo H. Steele for all shipments transported by him under said contracts with General Mills, Inc., were paid by General Mills, Inc., upon statements prepared by and submitted to General Mills, Inc., by Leo H. Steele, and accepted by him in accordance with the terms and provisions of the contract dated July 31st, 1941, and constitute full payment thereunder. Never at any time prior to the time that General Mills, Inc., notified Leo H. Steele of its intention to terminate said contract did Leo H. Steele ever claim, so far as is known to General Mills, Inc., that his operations were in competion with or substantially similar to service rendered by any common carrier or carriers, or make demand for payment of and from General Mills, Inc., on any other basis than that provided in the contract.

Affiant does not now recall whether or not Leo H. Steele ever showed affiant his contract carrier permit or the order granting the same, but states that if either the order or permit was shown to affiant it was merely exhibited in a casual manner as evidence that a permit had been granted, and was not read or examined by affiant. Until the filing of the above-entitled action affiant did not know the contents of either the permit or the order of the Railroad Commission pursuant to which it was granted.

Affiant states that he has been employed in the flour milling business for many years. From such experience he has come to know the characteristics of almost every form of transportation available for use in that business, [fol. 50] including transportation by common carrier, both motor carrier and railroad, contract motor carrier, and private truck operation. He knows that the kind and character of service rendered by Leo H. Steele under his contract with General Mills, Inc., was not in competition with nor substantially similar to the service rendered by common carriers.

Further affiant sayeth not.

(Signed) L. B. COLIFIX. (L. B. Colifix)

Subscribed and sworn to before me, a notary public in and for Oklahoma County, State of Oklahoma, this 13th day of June, 1944.

Hattie M. Palmer, Notary Public. My commission expires: March 18th, 1947. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRANK H. CROSS IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT.—Filed June 14, 1944.

[Title omitted]

Frank H. Cross having been first duly sworn, on his oath deposes and says:

He is now Traffic Manager and has been for a number of years in the Traffic Department of the Southwestern Division of General Mills, Inc., which has under its supervision and control the transportation of goods to and [fol. 51] from its mill located at Wichita Falls, Texas. That during the times herein named he has been acquainted with the kind and character of service rendered by Leo H. Steele under his transportation contract with General Mills, Inc., knows how shipments of the kind and character transported under such contract were transported before and have been transported since the contract was in effect, and is familiar with the characteristics of the various forms of transportation available for transporting goods and commodities such as General Mills, Inc., is called upon to transport to and from the mill at Wichita Falls, Texas, including common carriers, both motor carrier and railroad, contract motor carriers, and private truck operations. Affiant makes this affidavit of his own personal knowledge of the facts stated.

The kind and character of service rendered by Leo H. Steele under his contract with General Mills, Inc., was not in competition with nor substantially similar to services rendered by common carriers.

The great bulk of the goods and commodities transported by Leo H. Steele under his contract consisted of shipments generally known as less than car or truck load lots of mill

products, principally flour, consigned by General Mills, Inc., to its various customers within a radius of 150 miles of Wichita Falls, Texas. It was for this purpose that the contract was made. Although the truck would leave the mill at Wichita Falls fully loaded, such products would be distributed and delivered in smaller lots to customers along the routes of the several trucks. Relatively speaking, but few full truck loads of flour or other mill products were transported to one destination. Mr. Steele also transported some bulk grain from various nearby country elevators to the mill at Wichita Falls, Texas. In tonnage, flour and mills products, principally flour, made up approximately 75% of the total tonnage hauled by him for [fol. 52] General Mills, Inc., bulk grain approximately 20% or, in other words, flour, mill products, and bulk grain together made up approximately 95% of the total tonnage hauled. Other shipments that may have been hauled were merely incidental. For example, if one of the trucks of Leo H. Steele was in Fort Worth, Texas, after finishing its day's route and the mill at Wichita Falls was in need of some parts to repair its machinery, or needed bags or other mill supplies obtainable at Fort Worth, such truck, inasmuch as it was returning to Wichita Falls anyway, would bring back the needed parts or supplies. Sometimes premiums given with the flour would be loaded in the same truck. As stated, however, shipments of a kind and class other than less than truck load shipments of flour, mill products, and bulk wheat were merely an incident constituting not more than five or six per cent of the total tonnage hauled, and formed no part of the purpose for which the contract was made and entered into.

Service of the kind and character obtained from Leo H. Steele under his contract carrier contract with General Mills, Inc., was not a type of service that generally or normally could or would be obtained from a common carrier, even though a contract carrier was not available. It was a type of service which could only be furnished by a contract carrier dedicating his equipment exclusively to the particular shipper or by private truck operations. Upon and since the termination of such contract, the same has been true. Shipments made by General Mills, Inc., which were transported by common carrier prior to the making of the contract with Leo H. Steele continued to

be transported by common carrier the same as before. The making of the contract with Leo H. Steele did not take from common carriers shipments that would otherwise have been hauled by common carriers. Common carriers do not render a service suitable for the purpose for which the contract with Leo H. Steele was made and entered into.

[fol. 53] There may have been times during the period when the contract with Leo H. Steele was in effect, and in fact were, when shipments of the kind and character transported by him under the contract were delivered to and transported by common carriers. Such shipments, however, were due to some special circumstance or emergency and the service thus obtained was not a type of service meeting the every-day requirements of the business of General Mills, Inc. Less than truck or car load shipments transported by common carriers for General Mills, Inc., within the territory served by Leo H. Steele during the time his contract was in effect amounted to only 1/06% of the total tonnage hauled by both Leo H. Steele and such common carriers.

Affiant knows of his personal knowledge that in connection with the procurement by Leo. H. Steele of his contract carrier permit certain of the principal common motor carriers operating out of Wichita Falls, Texas, including some of the common carriers listed in the affidavit of Leo H. Steele, wrote letters to the Railroad Commission of Texas, advising it that they had no objection to the granting of the permit, in that the service to be rendered by Leo. H. Steele to General Mills, Inc., under the contract carrier contract was not competitive of service rendered by them as common carriers but was supplemental thereto.

Affiant is generally familiar with the transportation methods adopted by milling companies other than General Mills, Inc., for the transportation and delivery by them of shipments of the same kind and character as shipments handled by Leo H. Steele for General Mills, Inc., and does not know of a milling company in the southwestern states which uses common carrier service for that purpose. They either use contract carriers or carry on their own private truck operations. The similarity of service, if any exists,

[fol. 54] is between the service rendered by contract carriers and private truck operations, and not between the operations of contract carriers and common carriers.

In referring generally in this affidavit to shipments of the kind and character transported by Leo H. Steele, affiant has reference to the class of shipments that constituted the great bulk of the shipments transported by him under his contract, and for the transportation of which the contract was made. Other shipments, as above pointed out, were comparatively few and merely incidental, and formed no real part of the transportation service rendered by Leo H. Steele under his contract.

Further affiant sayeth not.

(Signed) Frank H. Cross (Frank H. Cross).

Subscribed and sworn to before me, a notary public in and for Oklahoma County, State of Oklahoma, this 12th day of June, 1944.

Hattie M. Palmer, Notary Public. My Commission expires March 18th, 1947. (Seal).

In United States District Court

First Amended Answer of Defendant—Filed November 30, 1944.

[Title omitted]

To the Honorable Judge of said Court:

Now comes defendant, General Mills, Inc., and files this its first amended answer in lieu of its original answer [fol. 55] heretofore filed, leave of the Court having been first had and obtained, such amended answer being in answer to complainant's first original amended bill of complaint, and for such amended answer defendant respectfully shows to the Court:

1

The first original amended bill of complaint fails to state a claim upon which relief can be granted.

2

Defendant admits the allegations contained in Section I of the amended bill of complaint except it specifically denies that there is due to complainant any under charges on various shipments of freight transported by complainant for defendant.

3

It admits the facts alleged in Section II of the amended bill of complaint.

4

With respect to the facts alleged in Section III of the amended bill of complaint, defendant admits complainant was a contract carrier operating under authority of the Railroad Commission of Texas by virtue of Contract Carrier Permit No. 11449 issued by such Commission, which said permit speaks for itself; it admits that such permit was issued by the Railroad Commission of Texas pursuant to an application filed by complainant and an amendment thereto, which said application and amendment thereto are annexed thereto and marked Exhibits 1 and 2 respectively; it admits that the Railroad Commission of Texas [fol. 56] entered an order granting complainant a permit as a contract carrier and that Exhibit "B" annexed to the bill of complaint is a correct copy of said order; it admits that Exhibit "C" annexed to said amended bill of complaint is a correct copy of the contract carrier permit issued by the Railroad Commission of Texas to complainant; it admits that it has in its possession original records pertaining to the various, sundry and many shipments moved by complainant but says in this connection that the facts relating thereto are as much within the knowledge of complainant as within the knowledge of defendant and the defendant has no more peculiar knowledge with respect thereto than complainant. It denies all other allegations contained in said Section III of the amended bill of complaint.

5

Defendant admits the allegations contained in Section IV of the amended bill of complaint.

6

With respect to Section V of the amended bill of complaint, defendant says that Section 6aa of Article 911b of

Vernon's Annotated Civil Statutes of Texas, reads as follows:

"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this state and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service." [fol. 57] It admits that General Order 25 was adopted by the Railroad Commission of Texas in the year 1931 and that a copy of such order is annexed to the amended bill of complaint as Exhibit "D"; it admits that there is contained in Railroad Commission of Texas, Motor Freight, Class and Commodity Tariff No. 1A, item 470, at page 15, section 3, thereof, the provision copied at the top of page 4 of the amended complaint, a copy of which is also annexed to the complaint as Exhibit "E". Contract Carrier Permit No. 11449, is silent on the subject of rates and speaks for itself. Defendant admits that complainant appeared at a hearing before the Commission in connection with his application for a permit and admits that one Mr. McCraney testified under oath before the Railroad Commission and that such testimony was given in connection with a hearing on complainant's application for a permit. Defendant denies all other allegations contained in Section V of the amended bill of complaint.

7

With respect to Section VI of the amended bill of complaint and the various statements or invoices referred to therein as Exhibit "F", defendant answers as follows: It admits said statements or invoices referred to as Exhibit "F" are substantially correct in so far as such statements or invoices show the dates of shipment, the consignor, consignee, the commodity, the designation and the weight, and the payments made by defendant to complainant from time to time. It likewise admits that the so-called charges and applicable rates shown on said statements and invoices are in accordance with the rates prescribed in Railroad Commission of Texas, Motor Freight, Class and Commodity Tariff No. 1A, but in this connection specifically denies that

such tariff, rates and classifications are applicable to the shipments shown in such exhibits and specifically denies that complainant is entitled to charge defendant on the [fol. 58] basis of such tariff rates, charges and classifications. It admits complainant's computation between the difference in charges paid and charges prescribed in said tariff (if applicable, which is denied) is substantially correct. It denies all other allegations contained in said Section VI.

8

Defendant admits the allegations made in Section VII of the complaint.

9

For further and special defense herein, defendant specifically denies that the Railroad Commission ever by order or otherwise applied or attempted to apply the rates, charges and classifications set forth in Railroad Commission of Texas, Motor Freight, Class and Commodity Tariff No. 1A to transportation services performed by complainant for defendant, and specifically denies that the Railroad Commission of Texas ever at any time found that the services performed by complainant for defendant or to be performed by him pursuant to the terms of the permit granted him by the Railroad Commission competed with the services performed by any common carrier, and specifically denies that the Railroad Commission at any time found that such services performed or to be performed were substantially the same as any services performed by any common carrier. On the other hand, defendant alleges that the order of the Commission of June 16, 1941, a copy of which is attached to the amended complaint as Exhibit "B", upon which the permit was granted to complainant finds in effect that complainant's operations thereunder will not compete with the operations of any common carrier and that the character of services to be performed there- [fol. 59] under are and were not substantially similar to the character of service performed by any common carrier. In this connection defendant further alleges that as a matter of fact the operations of complainant did not compete with the operations of any common carrier and that the said complainant in performing transportation services for defendant upon which this suit is based in no sense competed with any common carrier or common carriers and the

services performed by him were not substantially the same as the services performed by any common carrier or carriers.

10

For additional and special defense, defendant says that if the orders and acts of the Railroad Commission, as evidenced by the exhibits attached to complainant's amended complaint, be construed as an attempt on the part of the Railroad Commission of Texas to make applicable the tariff rates as alleged, then such orders and acts of the Railroad Commission of Texas in so far as they might be construed to fix such tariff rates as minimum rates to be observed in connection with the services involved herein were and are invalid and void and without authority of law for the following reasons, to-wit:

(a) The only power delegated by law to the Railroad Commission of Texas to fix rates and charges to be observed by contract carriers is that power delegated by the Legislature of Texas to the Railroad Commission under Section 6aa, Article 911b, Revised Statutes of Texas, which provision of the Texas statutes is heretofore copied in this answer and to which reference is here made. Under this statute the Railroad Commission of Texas only has jurisdiction over contract carrier rates where contract carriers operate in competition with common carriers and perform substantially the same service as that performed by common carriers. When contract carriers operating under a [fol. 60] permit from the Railroad Commission of Texas do not operate in competition with common carriers and do not render substantially the same service as that rendered by common carriers, the Railroad Commission of Texas is without power to fix minimum rates and is without jurisdiction over the rates collected by such contract carrier. The Railroad Commission of Texas made no findings in support of camplainant's alleged claim that it had power and jurisdiction to fix rates governing the transportation here involved. Such Commission neither expressly nor impliedly found the existence of competition with common carriers or that the service to be performed would be substantially similar to the services performed by common carriers in the order granting the permit, nor in the permit itself nor in any other order entered in the proceeding. On the other hand, the order granting the per-

mit of date June 16, 1941, Exhibit B to complainant's amended bill, expressly and impliedly found lack of competition with common carriers and that the services to be performed by Steele were not substantially similar to those performed by common carriers and thereby expressly and impliedly found facts showing complete lack of jurisdiction on the part of the Commission over the rates to be charged and paid by this defendant to Steele for the transportation services involved.

(b) The only action of the Railroad Commission which might be construed as an attempt on the part of the Railroad Commission to require the payment of minimum rates by defendant to complainant arises out of the failure of the Railroad Commission to make a contrary provision in the permit granted to complainant and in the order granting such permit. Neither the order nor the permit make any findings which would justify the Railroad Commission to fix rates or minimum rates to be collected for the services authorized to be performed by complainant for defendant under the permit. The Commission on the other hand in [fol. 61] the order of June 16, 1941, Exhibit "B" to complainant's amended bill of complainant, makes findings of fact which expressly and impliedly negative the existence of competition between the complainant and common carriers in the performance of the services authorized to be performed and likewise negatives any contention that such services authorized to be performed is or was substantially similar to any services performed by common carriers. Therefore, the order and the permit if construed as requiring the collection of minimum rates prescribed in Tariff 1A show on their face lack of power in or jurisdiction of the Railroad Commission over the rates and fares collected by complainant from defendant.

(c) The operations of the complainant Steele under the permit granted him by the Railroad Commission heretofore referred to were not in competition with common carriers over the highways of Texas and the said complainant Steele did not compete with common carriers in hauling and transporting defendant's goods, wares and merchandise and the services rendered by the said Steele were in fact not substantially the same as services rendered by common carriers. The Railroad Commission therefore in fact was without power, jurisdiction or authority in law

to fix or prescribe minimum rates and schedules to be observed as alleged by complainant Steele.

(d) The acts of the Commission are and were arbitrary and without finding of fact sufficient to support the action taken by the Commission.

(e) The acts of the Commission violate the freedom of contract, guaranteed to defendant under the Constitutions of the State of Texas and of the United States, and likewise unconstitutionally deprive the defendant of its property without due process of law.

[fol. 62]

11

For further and additional defense, defendant says that if the laws of the State of Texas be construed as empowering the Railroad Commission of Texas to fix rates and charges to be collected for the services performed by complainant for defendant under the facts and circumstances herein alleged, then defendant says that such statutes of the State of Texas are unconstitutional and void as thus construed and applied for the reason that such statutes violate the freedom of contact guaranteed by the state and federal Constitutions and deprive defendant of its property without due process of law, all in violation of the Fifth Amendment and Section 10, Article I, of the Constitution of the United States, and Sections 16, 17 and 19 of Article I of the Constitution of the State of Texas.

12

For additional, further and special defense, defendant says that if the rates, rules and regulations prescribed in the Railroad Commission Tariff 1A, referred to in the amended complaint, be applied to defendant and to the transportation services performed by the complainant for defendant under a private transportation contract and that if legislative authority exists for such action on the part of the Commission this would have the effect of transforming by compulsion of law and order of the Commission the complainant from a private contract carrier into a common carrier, and the action of the Commission and the legislative authority therefore is contrary to the Constitutions of the State of Texas and of the United States, and violates the freedom of contract therein guaranteed and

the provisions thereof which prohibit the taking of property without due process of law, all in violation of the Fifth Amendment and Section 10, Article I, of the Constitution [fol. 63] of the United States, and Sections 16, 17 and 19 of Article I of the Constitution of the State of Texas.

13

To the extent that Article 911b of the Revised Statutes of Texas constitutes an attempt to authorize the Railroad Commission of Texas to fix rates, rules and regulations for contract motor carriers, such statute constitutes an unconstitutional delegation of legislative power and fixes no proper standards governing the action of the Commission, and is therefore void and of no effect, in violation of Article III, Section 1, of the Constitution of the State of Texas.

14

For further and special answer herein and as an additional affirmative defense, defendant specifically denies that the provisions of the contract bearing date of August 26, 1940, marked Exhibit "A" to the amended bill of complaint, constitute the entire contract and agreement between complainant and defendant with respect to the transportation services made the basis of this suit. On the other hand, defendant alleges that under date of July 31, 1941, and prior to the rendition of any transportation services involved herein, the parties hereto entered into a supplemental contract, a true and correct copy of which is attached hereto and marked Exhibit 3. This supplemental contract amended paragraph 13 of the contract bearing date of August 26, 1940, Exhibit "A" aforesaid, and was in effect at all times during the period involved in this suit. Said supplemental agreement was entered into subsequent to the time the Railroad Commission of Texas granted complainant a permit to transport goods and property for defendant and [fol. 64] it was expressly agreed between complainant and defendant under and by virtue of the terms of said contract that the Railroad Commission of Texas had not fixed rates, charges or tariffs for the kind and character of services to be rendered under said contract and the parties agreed in such supplemental agreement upon the compensation to be paid by defendant to complainant for the services performed by him under said agreement. Defendant has

paid to complainant and complainant has accepted all sums due, payable and required under said agreement in full settlement of all services rendered by him, all of which defendant pleads as a complete bar to complainant's right to recover herein.

15

For further, additional and affirmative defense, defendant pleads the following facts: Prior to August 1, 1941, defendant had used and employed its own trucks and transportation facilities to transport the character of goods, wares and merchandise thereafter transported for it by complainant. Some time prior to August 1, 1941, negotiations began between complainant and defendant looking toward an agreement whereby complainant would transport the goods, wares and merchandise for defendant under a private transportation contract. Negotiations continued over a period of months and complainant and his attorneys addressed numerous communications to defendant with respect to the right of the parties to fix by private contract charges to be paid complainant for the transportation services contemplated. Likewise, there were several meetings when this subject was discussed. Complainant and his attorneys assured defendant that the services contemplated would not compete with any services rendered by common carriers and likewise assured defendant that the services contemplated to be performed by complainant were and would not be substantially similar to services [fol. 65] performed by any common carrier and that as a result thereof the tariff of the Railroad Commission of Texas have no application to the charges to be paid complainant under the agreement. There are attached hereto copies of letters between the parties with respect to these allegations, such letters being marked Exhibits 4, 5, 6, 7, 8, and 9, respectively. Exhibits 4 to 8, inclusive, were all delivered to or forwarded to defendant for the purpose of inducing it to enter into a private transportation contract with plaintiff. The original agreement, Exhibit "A" to complainant's amended bill of complaint, though dated August 26, 1940, was not actually executed and agreed to by the parties until on or after April 17, 1941, and at such time it was understood and agreed between the complainant and defendant that the Railroad Commission of Texas had

not fixed any charges or tariffs or rules and regulations governing the kind and character of services to be rendered under the agreement, and that the Commission was without power to do so, and it was understood and contemplated between the parties that prior to the performance of any services under said contract a supplemental contract would be executed, the terms of which had theretofore been substantially agreed upon, fixing the charges to be paid to complainant and the services to be rendered. Thereafter the parties did enter into a supplemental agreement fixing the compensation to be paid complainant, a true and correct copy of which is hereto attached, marked Exhibit 3 and made a part hereof, which said agreement was in full force and effect during all the times the hauling and transportation here involved were done by complainant for defendant and fixed and defined the rights of the parties thereto. As a result of the facts herein alleged complainant is now estopped from asserting the tariff relied upon by him is and was applicable to the services rendered by him to defendant and is estopped from making any claim or contention that [fol. 66] such services and operations competed with any common carrier or that any common carrier or carriers performed any services substantially the same as those performed by complainant and is likewise estopped from claiming that the Railroad Commission of Texas had power or jurisdiction to fix minimum rates to be observed by him and is estopped from predicating a cause of action based upon the alleged tariffs of the Commission.

16

For further affirmative and alternate defense, this defendant respectfully says that no cause of action exists in plaintiff's favor to collect the rates and fares set forth in the tariffs of the Railroad Commission of Texas even if applicable (which is denied) to the transportation and hauling involved herein. As heretofore alleged, particularly in paragraphs numbered 14 and 15 hereof, it was always understood and contemplated by plaintiff and defendant that an agreement would be entered into providing for compensation to plaintiff substantially in accordance with the provisions set forth in the supplemental agreement, Exhibit 3 hereto. All hauling and transportation was handled by plaintiff for defendant under and pursuant to

this agreement and plaintiff was at all times paid strictly in accordance with the terms thereof and by reason of all the facts herein alleged he may not now sue to recover the alleged tariff rates of the Railroad Commission even if applicable and is estopped by virtue of his own conduct and his own acts from recovering herein, particularly in view of the fact that he was fully advised of all the facts and circumstances at the time the agreement was made.

17

Further answering herein defendant here now pleads the two-year statute of limitation to all that part of plain-
[fol. 67] tiff's claim arising and accruing more than two years prior to the institution of this suit.

Wherefore, having fully answered, defendant prays that complainant take nothing by reason of this suit and that it go hence without day and recover its costs.

Miley, Hoffman, France & Johnson, By Charles E. France, Oklahoma City, Oklahoma; Cantey, Hanger, McMahon, McKnight & Johnson, By Alfred McKnight, Attorneys for the Defendant, General Mills, Inc., Fort Worth, Texas.

EXHIBIT 1

Before the Railroad Commission of Texas

Application of Leo H. Steele, dba Steele Distributing Company of Wichita Falls, Texas, for Contract Carrier Permit. Motor Carrier Docket No. 9705.

To the Railroad Commission of Texas:

The undersigned hereby makes application for a contract carrier permit, and respectfully submits the following facts:

(1) The name and address of the applicant are: Leo H. Steele, dba Steele Distributing Company, Wichita Falls, Texas.

[fol. 68] (2) Your applicant operates as an individual and he is the sole owner.

(3) Exhibit "A" attached to and made a part of this application sets forth accurately the financial condition

of applicant showing all assets of every kind and character and present value thereof and all liabilities of every kind and character, including debts secured by mortgages and not secured, judgments and current indebtedness and all other liabilities.

(4) Number of trucks to be operated.
(See Exhibit "B" attached hereto.)

(5) Exhibit "C". Description of all property owned and used in motor carrier service, including repair shops, terminal and station facilities.
(See Exhibit "C" hereto attached.)

(6) Exhibit "E". Rates proposed to be charged for the transportation of property between the several points and through rates.
(See Exhibit "E" attached hereto.)

(7) Exhibit "F". Schedule of proposed service.
See Exhibit "F" attached hereto.)

(8) It is proposed by this applicant that he will contract and haul the products of General Mills, Inc., the nature of such service and the products to be hauled and [fol. 69] the area to be served are all fully set forth in Exhibit "G" hereto attached.

Leo H. Steele, dbs Steele Distributing Company, Applicant, by (Signed) Cecil A. Morgan.

Dated at Fort Worth, Texas, August 26, 1940.

THE STATE OF TEXAS,
County of Tarrant:

I, Leo H. Steele, dba Steel Distributing Company, (Applicant) do solemnly swear that the facts stated in the foregoing and all exhibits attached hereto are true and correct and that said statement of facts constitutes a complete statement of the matters to which it relates.

(Signed) Leo H. Steele.

Subscribed and sworn to before me, this the 26th day of August, A. D. 1940. (Signed) Doris Shrake, Notary Public in and for Tarrant County, Texas. Cecil A. Morgan, Attorney for the Applicant.

Fort Worth, Texas.

Exhibit "A"

Assets:

Cash	$500.00
Home	4,000.00
Automobile	550.00
10 shares Texaco common stock	350.00
14 shares Consolidated oil stock	100.00
	$5,500.00

Liabilities:

Due on home	$2,800.00

[fol. 70] Financial arrangements have been completed whereby the applicant will acquire clear title to the 12 trucks that he proposes to operate, the value of which will be $——.

Exhibit "B"

Your applicant expects to use 12 trucks, one truck consisting of cab and tractor-trailer, and the other 11 will be bodies built on trucks, all of which equipment will be in accordance with requirements, rules and regulations of the Railroad Commission and of the laws of this state.

Exhibit "C"

Your applicant proposes to have his own terminals, shops, vehicles and all other necessary equipment to render a complete contract carrier service as applied to the shipper named in the application. The nature and amount of such facilities are to be limited to the needs and the number of trucks proposed to be operated.

Exhibit "E"

Applicant proposes that the tariff to be charged for the service proposed to be rendered will be that as promulgated by the Railroad Commission of Texas.

Exhibit "G"

The applicant Leo H. Steele, dba Steele Distributing Company files this application to operate as a contract

carrier for General Mills, Inc. and in connection therewith your applicant would show:

[fol. 71] General Mills, Inc. is a manufacturing Company engaged in the business of manufacturing wheat into flour, feed, cereals and other mill and grain products. That said company has been engaged in this business for many, many years; that it now has one of its mills located in Wichita Falls, Texas, where it is engaged and has been engaged for many years in the manufacture of the products above listed; that in the distribution of its manufactured products and to meet the needs of this shipper and that of the public which it serves said company requires and employs the services of the railroads and the common carrier motor freight lines; that the movements of grain and manufactured products to and from the mills of this company require the services of the railroads and the common carrier truck line of practically 90 per cent of all of the products. However, in addition to the cities and towns that are served by the rail lines and the common carrier motor lines there are a large number of cities and towns in the state of Texas that do not have such services and it is proposed by this applicant to serve said shipper, namely General Mills, Inc. and those cities and towns that are not otherwise served by hauling their products to such places. In addition thereto there are many grocery stores, feed stores and other business concerns that are known and commonly designated as "country stores" that are located off the main thoroughfares and that are not served either by rail nor by common carrier motor lines. That these country stores and the merchants operating the same and the public that is served by them are entitled to the services of a carrier that will serve their needs of the products manufactured by General Mills, Inc. It is proposed by this applicant that he will serve such country stores thereby rendering a needed service to the public, the local merchant and the shipper. Your applicant would show that the needs of the public for the products of this shipper will vary in different localities [fol. 72] thereby making it necessary for the shipment of said products to be in broken lots, that is to say that a small merchant operating a small country store would require a very small shipment from time to time, while a merchant operating a larger store who serves a larger trade area would require a larger shipment, thus to properly and ade-

quately meet the needs of the public to be served and the merchant who operates the stores for the benefit of the immediate trade territory it is necessary that the carrier make both small and large shipments from place to place as the needs of the particular locality may require. That the public in the various localities and facilities thus situated as hereinbefore outlined are entitled to the services as is here proposed and that it is impossible for such services to be rendered by existing facilities of the railroads and the common carrier motor truck lines in this state. Your applicant would further show that by the very nature of the service proposed to be rendered to the general public which is located off of the main thoroughfares and rail lines that a definite designated route to and from such location would be impractical if not impossible. In connection therewith your applicant would show a large percent of the movement of the shipments as herein proposed would be over dirt roads, gravel roads and the highways that are commonly known as county roads as distinguished from highways that are known as U. S. Highways and State highways but that in traveling to and from said county roads that of necessity and by the very nature of the movements that said shipments would move in part over all types of highways and different sections thereof, thus it is proposed by this operation that said movements shall be to and from and over any and all highways in the state.

Your applicant would further show that the shipper, General Mills, Inc. operates in Texas two mills which are [fol. 73] located at Wichita Falls and Amarillo, Texas respectively, and that in this section of the state great distances exist between the various towns and communities; that many of the small communities are isolated from the larger cities in that they do not have adequate common carrier service to meet the needs of such communities. By this operation it is proposed that the shipper will continue to employ the services of the railroads and that of the common carrier truck lines where their services offer and are adequate to meet the needs of this shipper and that of the general public and it is proposed by this operation to meet only the needs of the public generally that is not otherwise served by common carrier facilities.

Your applicant would further show that the highways in this state are adequate and are in a state of repair and in such condition as that the same would not be impaired

or unreasonably congested by the use thereof and by the equipment proposed to be used by this applicant.

Your applicant would further show that the equipment which he proposes to use is peculiarly susceptible to the use and will definitely meet the needs of the shipper. That said equipment will be designed primarily to meet the requirements of said shipper as distinguished from equipment that is designed for common carrier service, thus supplying the needs of the general public in this state for this particular type of product; that the needs of the merchants in the various parts of the State of Texas, from time to time that need the products manufactured by this shipper to be distributed by them to the public generally and the needs of the general public of said products can be met and met only by the service proposed to be rendered by this applicant. The granting of this application to your applicant will enable said shipper to have its merchandise trans- [fol. 74] ported from points where they are manufactured and distributed direct to the merchant and consumers over the state, thereby eliminating interchanges, re-billing, extra handling, delays and damage to cargo. This will result in an expedited service to such shipper and the public to be served. There are no other carriers now authorized to render the shipper the character of service proposed to be rendered by applicant and such service is not now available to the public.

Applicant says there is a public need for the proposed service and that it will be a convenience to the public in that service to, from and between the points involved now being rendered by other carriers is inadequate between the same is slow, infrequent, indirect and uncertain, and the transportation of shipments to, from and between said points by other carriers involves interchange and rehandling of such shipments, which results in delays and unsatisfactory service to the public; that if this application is granted, applicant will coordinate the service, which will insure a prompt, efficient and coordinated service to the public which cannot be accomplished through interchange arrangements with other carriers; that this coordinated service will afford a dependable, efficient and expedited motor carrier service to and from and between all cities and towns served by applicant, all under one management and the same will be rendered by a carrier with experience and financial responsibility.

That there is a substantial volume of tonnage available to be transported to, from and between the cities and towns covered by this application by the shipper above referred to and that the needs of the public require the granting of this application for all of the reasons herein alleged and that the public demands will be secured by the granting of this application.

[fol. 75] That the needs of the general public, the merchants and the shipper in the instant case requires on certain occasions that certain shipments be made hurriedly in the nature of an emergency; that in such cases it is essential to meet the needs of the public that the services be rendered instantly and that deliveries of the products be made direct from the shipper to the merchant day or night without reference to fixed and definite schedules or without regard to the highways to be traveled in making such deliveries, thereby making the service as proposed by this applicant essential and necessary to meet the needs of the public, the merchant, the shipper and in this regard your applicant would show that the existing facilities are inadequate to meet such needs.

EXHIBIT 2

BEFORE THE RAILROAD COMMISSION OF TEXAS

Application of LEO H. STEELE, dba Steele Distributing Company of Wichita Falls, Texas for Contract Carrier Permit

Motor Carrier Docket No. 9705

To the Railroad Commission of Texas:

Comes now, Leo H. Steele, dba Steele Distributing Company applicant in the above styled case for a contract carrier permit, and after first having obtained permission of the Commission so to do, files this Amendment to his Original Application, insofar only as the same relates to Exhibit "G," and with respect would show:

That the Original Application as now on file with the Commission shall be and remain identical as it now is as [fol. 76] to all of its part, including all exhibits with the

exception of Exhibit G, and this Amendment is to be substituted in lieu of Exhibit G now attached to the Original Application, and for such Amended Exhibit "G", your applicant would show:

Exhibit "G"

The Applicant Leo H. Steele, dba Steele Distributing Company files this application to operate as a contract carrier for General Mills, Inc. and in connection therewith your applicant would show:

General Mills, Inc. is a manufacturing company engaged in the business of manufacturing wheat into flour, feed, cereals and other mill and grain products. That said company has been engaged in this business for many, many years; that it now has one of its mills located at Wichita Falls, Texas, where it is engaged and has been for many years in the manufacture of the products above listed; that in the distribution of its manufactured products and to meet the needs of this shipper and that of the public which it serves said company requires and employs the services of the railroads and the common carrier motor freight lines; that the movements of grain and manufactured products to and from the mills of this company require the services of the railroads and the common carrier truck line of practically 90 per cent of all of the products. However, in addition to the cities and towns that are served by the rail lines and the common carrier motor lines there are a large number of cities and towns in the state of Texas that do not have such services and it is proposed by this applicant to serve said shipper, namely, General Mills, Inc. and those cities and towns that are not otherwise served [fol. 77] by hauling their products to such places. In addition thereto, there are many grocery stores, feed stores and other business concerns that are known and commonly designated as "country stores" that are located off the main thoroughfares and that are not served either by rail nor by common carrier motor lines. That these country stores and the merchants operating the same and the public that is served by them are entitled to the service of a carrier that will serve their needs of the products manufactured by General Mills, Inc. It is proposed by this applicant that he will serve such country stores, thereby rendering a needed service to the public, the local merchant and to the

shipper. Your applicant would show that the needs of the public for the products of this shipper will vary in different localities thereby making it necessary for the shipment of said products to be in broken lots, that is to say that a small merchant operating a small country store would require a very small shipment from time to time, while a merchant operating a larger store who serves a larger trade area would require a larger shipment, thus to properly and adequately meet the needs of the public to be served and the merchants who operate the stores for the benefit of the immediate trade territory, it is necessary that the carrier make both small and large shipments from place to place as the needs of the particular locality may require. That the public in the various localities and facilities thus situated as herein above outlined are entitled to the services as is here proposed and that it is impossible for such services to be rendered by existing facilities of the railroads and the common carrier motor truck lines in this state. Your applicant would further show that by the very nature of the service proposed to be rendered to the general public which is located off of the main thoroughfares and rail lines that a definite designated route to and from such location would be impractical if not impossible. In connection [fol. 78] therewith your applicant would show a large percent of the movement of the shipments as herein proposed would be over dirt roads, gravel roads and the highways that are commonly known as county roads as distinguished from highways that are commonly known as U. S. highways and State highways, but that in traveling to and from said county roads that of necessity and by the very nature of the movements that said shipments would move in part over all types of highways and different sections thereof, thus it is proposed by this operation that said movements shall be to and from and over any and all highways in the state.

Your applicant would further show that the shipper, General Mills, Inc. operates in Texas two mills which are located at Wichita Falls and Amarillo, Texas, respectively, and that in this section of the state great distances exist between the various towns and communities; that many of the small communities are isolated from the larger cities in that they do not have adequate common carrier service to meet the needs of such communities. By this operation it is proposed that the shipper will continue to employ and

use the services of the railroads and that of the common carriers truck lines where their services are adequate to meet the needs of this shipper. However, in connection therewith, your applicant would further show that emergencies have in past times arisen and in all probability in the future will arise whereby it will be necessary for the shipper to make an immediate direct emergency delivery to certain stores that are located upon certain highways and certain towns now being served by a common carrier truck line and railroad, and it is proposed by this service that in the event such need should arise that your applicant shall perform such services for said shipper. That is to say it is proposed by this application that when it is necessary to [fol. 79] adequately meet the needs of this shipper, the applicant will use any and all highways of this state to, from and between any and all points in delivering the goods, wares and merchandise of said shipper.

Your applicant would further show that the highways in this state are adequate and are in such a state of repair and in such condition as that the same would not be impaired or unreasonably congested by the use thereof and by the equipment proposed to be used by this applicant.

Your applicant would further show that the equipment which he proposes to use is peculiarly susceptible to the use and will definitely meet the needs of this shipper. That said equipment will be designed primarily to meet the requirements of said shipper as distinguished from equipment that is designed for common carrier service, thus supplying the needs of the general public in this state for this particular type of product; that the needs of the merchants in the various parts of the State of Texas from time to time that need the products as manufactured by this shipper to be distributed by them to the public generally and the needs of the general public of said products can be met and met only by the service proposed to be rendered by this applicant. The granting of this application to your applicant will enable said shipper to have its merchandise transported from points where they are manufactured and distributed direct to the merchant and consumers over the state, thereby eliminating interchanges, rebilling, extra handling, delays and damage to cargo. This will result in an expedited service to such shipper and the public to be served. There are no other carriers now authorized to render the shipper the char-

acter of service proposed to be rendered by applicant and such service is now not available to the public.

[fol. 80] Applicant says there is a public need for the proposed service and that it will be a convenience to the public in that service to, from and between the points involved now being rendered by other carriers is inadequate because the same is slow, infrequent, indirect and uncertain, and the transportation of shipments to, from and between said points by other carriers involves interchange and rehandling of such shipments, which results in delays and unsatisfactory service to the public; that if this application is granted applicant will coorrdinate the service, which will insure a prompt, efficient and coordinated service to the public which cannot be accomplished through interchange arrangements with other carriers; that this coordinated service will afford a dependable, efficient and expedited motor carrier service to and from and between all cities and towns served by the applicant; all under one management and the same will be rendered by a carrier with experience and financial responsibility.

That there is a substantial volume of tonnage available to be transported to, from and between the cities and towns covered by this application by the shipper above referred to and that the needs of the public require the granting of this application for all of the reasons herein alleged and that said public demands will be secured by the granting of this application.

That the needs of the general public, the merchants and the shipper in the instant case requires on certain occasions that certain shipments be made hurriedly in the nature of an emergency; that in such cases it is essential to meet the needs of the public that the services be rendered instantly and that deliveries of the products be made direct from the shipper to the merchant day or night without reference to fixed and definite schedules or without regard to the highways to be traveled in making such deliveries, thereby making the service as pro- [fol. 81] posed by this applicant essential and necessary to meet the needs of the public, the merchant, the shipper and in this regard your applicant would show that the existing facilities are inadequate to meet such needs. That as stated above, it is proposed that the shipper will not ship more than ten or fifteen percent of its total goods, wares and merchandise by this carrier but will continue to use

the railroads and the common carrier motor carrier for the shipment of its products, and that more than 90 per cent of all the shipments made and the goods to be carried by this applicant will be deliveries made to "country stores", and that the emergency deliveries as referred to in the first sentence of this paragraph hereinabove will probably consist of not more than 10 per cent of the goods to be carried by this applicant for said shipper.

(Exhibit 3 to defendant's first amended answer appears in the Court Reporter's transcript as defendant's Exhibit No. 8. Exhibits 4, 5, 6, 7 and 8, appear in the Court Reporter's transcript as defendant's Exhibits 1, 2, 3, 4 and 5, respectively.)

IN UNITED STATES DISTRICT COURT

DEFENDANT'S SPECIALLY REQUESTED ISSUE No. 1—Filed December 14, 1944

[Title omitted]

Do you find from a preponderance of the evidence in this case that the operations of plaintiff Steele under his contract with defendant were in competition with common [fol. 82] carriers over the highways of Texas. Answer "Yes" or "No".

Answer: No.

Respectfully submitted, Miley, Hoffman, France & Johnson, Cantey, Hanger, McMahon, McKnight & Johnson, Attorneys for Defendant, General Mills, Inc.

The above requested issue was duly and seasonably presented to me and was by me given.

James C. Wilson, United States District Judge.
Mickey Maguire, Foreman.

IN UNITED STATES DISTRICT COURT

SPECIAL ISSUE No. 2—Filed December 14, 1944

[Title omitted]

Do you find from the evidence in this case that Plaintiff Steele rendered substantially the same service as that

rendered by common carriers, during the time, and in the area of transportation, here involved.

Answes Yes or No.

Answer: No.

Mickey Maguire, Foreman.

[fol. 83] In United States District Court

Defendant's Specially Requested Instruction No. 2—Filed December 14, 1944

[Title omitted]

Competition

Gentlemen of the Jury:

You are also instructed that competition in operations as used in issue or issues submitted to you involves the element of the substantial characteristics and nature of the operations of the respective parties and in determining the existence of such competition in operations you shall also further take into consideration and compare the substantial characteristics and nature of the operations of the respective parties involved.

Respectfully submitted, Miley, Hoffman, France & Johnson, Cantey, Hanger, McMahan, McKnight & Johnson, Attorneys for Defendant, General Mills, Inc.

The above requested instruction was duly and seasonably presented to me and was by me given.

James C. Wilson, United States District Judge.

[fol. 84] In United States District Court

Charge on Burden of Proof—Filed December 14, 1944

[Title omitted]

Gentlemen of the Jury, the defendant raises the issue presented here, that the hauling done by the plaintiff for the defendant was not of such a character as to be in

competition with common carriers; also, that the services performed by plaintiff for defendant were not substantially the services performed by common carriers. The burden of proof is therefore upon the defendant to establish its allegation by the greater weight or preponderance of the evidence. Unless you are satisfied from a preponderance or greater weight of the evidence that the plaintiff's services for the defendant were not done in competition with common carriers, it would be your duty to find against defendant on that issue. Likewise, if you are not able to find from the greater weight or preponderance of the evidence that services rendered by the plaintiff for the defendant were substantially the services rendered by common carriers, as to that issue, it would be your duty also to find against the defendant. In other words, to answer the special issues submitted to you, in the affirmative.

SUBSTANTIALLY SAME SERVICE

GENTLEMEN OF THE JURY:

You are instructed that "substantially the same service" as inquired about in issue or issues submitted to you by the Court means that the services being compared must be substantially the same in all their material and essential elements. Services which are not substantially the same in all of their essential and material respects will not be considered by you as substantially the same service as inquired about in issue or issues submitted. "Sub-
[fol. 85] stantially the same service" does not mean an identical service, but it must be really and actually in a substantial sense a similar service, taking all the characteristics of the two services into account.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S SPECIALLY REQUESTED INSTRUCTION NO. 1

[Title omitted]

Gentlemen of the Jury:

You are instructed that "competition" as required about in issue or issues submitted to you by the Court means actual and substantial rivalry in substantial and material

elements of the object sought to be accomplished by the shipper and does not mean incidental or immaterial elements. You shall therefore take into consideration the material requirements of the shipper and the object it sought to accomplish. In determining whether or not there exists competition for such object each competing party must be in a position to render or be capable of rendering the substantial services required by the shipper and have available the facilities necessary to do so in order to meet the needs of the shipper and to accomplish the objectives sought.

Respectfully submitted, Miley, Hoffman, France & Johnson, Cantey, Hanger, McMahon, McKnight & Johnson, Attorneys for Defendant, General Mills, Inc.

The above requested instruction was duly and seasonably presented to me and was by me refused.

James C. Wilson, United States District Court.

[fol. 86] IN UNITED STATES DISTRICT COURT

DEFENDANT'S SPECIALLY REQUESTED INSTRUCTION NO. 3

[Title omitted]

Gentlemen of the Jury:

You are instructed that "substantially the same service" as inquired about in issue or issues submitted to you by the Court means that the services being compared must be substantially the same in all their material and essential elements. Services which are not substantially the same in all of their essential and material respects will not be considered by you as substantially the same service as inquired about in issue or issues submitted.

Respectfully submitted, Miley, Hoffman, France & Johnson. Cantey, Hanger, McMahon, McKnight & Johnson, Attorneys for Defendant, General Mills, Inc.

The above requested instruction was duly and seasonably presented to me and was by me refused.

James C. Wilson, United States District Judge.

[fol. 87] IN UNITED STATES DISTRICT COURT

INSTRUCTION TO JURY AND VERDICT—Filed December 15, 1944

[Title omitted]

Instruction to Jury

Gentlemen of the Jury:

You are hereby instructed to return a verdict for plaintiff.

James C. Wilson, Judge United States District Court.

VERDICT

We, the Jury, find for plaintiff.

Mickey Maguire, Foreman.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed December 23, 1944

[Title omitted]

Leo H. Steele, plaintiff, files this motion with the Court for Findings of Fact and Conclusions of Law. In support thereof states, that this motion is being made at the conclusion of the evidence and before the Court has entered a formal judgment in this cause.

Respectfully submitted, Culbertson, Morgan, Christopher & Bailey, Attorneys for Plaintiff.

806 First National Bank Bldg., Fort Worth, Texas.

[fol. 88] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law and Objections Thereto—Filed March 5, 1945

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the plaintiff's motion therefor, the Court finds the facts in the above case and his conclusions of law thereon to be as follows; to-wit:

1. Pursuant to the provisions of Article 911b Vernon's Civil Statutes of Texas, the Railroad Commission of Texas promulgated its General Order No. 25 on the 22nd day of August, 1931 relating to the minimum rates to be charged by contract motor carriers, and the relevant portion of said order provides:

"It is, therefore, ordered by the Railroad Commission of Texas, that, effective August 22, 1931, all Contract Motor Carriers, as hereinbefore defined, be and they are hereby order- to observe and apply as minimum temporarily and until further orders of this Commission, pursuant to hearing called for Monday, August 31, 1931, under Motor Freight Circular No. 1297, the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Calss "A" Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, 23 amended; Railroad Commission of Texas Motor Freight General Rules Circular No. 1, as amended; and Railroad Commission of Texas Commodity Tariff No. 2, (Cotton and Cotton Linters), as amended."

[fol. 89] A copy of said General Order of the Railroad Commission is attached to the plaintiff's Bill of Complaint, marked Exhibit "D" and the reporter in this case identified the same in the trial of this case as Exhibit 4.

2. That the Railroad Commission on July 26, 1940 promulgated or repromulgated Motor Freight Class and Commodity Tariffs No. 1-A and the material and relevant part thereof as relates to the case under consideration in Section 3, Item No. 470, entitled "General Application of

Rates," and the relevant part thereof is copied as follows, to-wit:

"General Application of Rates."

Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed:

(A) By Common Carrier Motor Carriers on Texas Intrastate Traffic. (See Exception.)

Exception: The Rates, Ratings, Rules and Regulations Provided Herein Will Not Apply Between Beaumont and Port Arthur on Traffic Transported by F. N. Ragsdale for the Account of Railway Express Agency, Incorporated.

(B) By Contract Motor Carriers, as Minimum, on Texas Intrastate Traffic, Unless Permits Issued by the Commission Provide to the Contrary.

(Cir. 1001, General Order 25, and Cirs. 1514, 2073, and 2198.)"

The same being set forth in Exhibit No. E to plaintiff's Bill of Complaint and identified by the reporter in the trial of this case as Exhibit No. 5.

[fol. 90] 3. That Item No. 600 of the Class and Commodity Tariff No. 1-A Motor Freight rates as promulgated by the Railroad Commission of Texas provides "unless otherwise specifically provided herein, the rates named in this tariff cover transportation charges from sidewalk or dock at origin to side-walk or dock at point of destination." Said portion of Item No. 600 having been introduced in evidence. See report page ——

4. That each and all of the above items and orders of the Railroad Commission of Texas were in effect during all of the time relevant to the transactions between the plaintiff and the defendant in this law suit.

5. That on the 17th day of April, 1941 (although the contract is dated Aug. 26, 1940) plaintiff Leo H. Steele entered into a contract with defendant General Mills, Inc. whereby the plaintiff agreed to haul the products of the defendant as a contract carrier from its mills in Wichita Falls and Amarillo, Texas. A copy of said contract being attached to the plaintiff's Bill of Complaint as Exhibit A and introduced in evidence in the trial hereof and iden-

tified by the reporter as Exhibit No. 1. The material part thereof as relates to rates is found in paragraph 13 thereof which provided:

"13. It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

[fol. 91] Based upon said contract the plaintiff Steele made application to the Railroad Commission of Texas for a permit to operate over the highways of Texas and to haul the products of the defendant. The plaintiff appeared in person on behalf of his application. Likewise, a representative of the defendant appeared before the Railroad Commission on said application. The contract referred to in the above paragraph was presented to said Commission for the express purpose of obtaining a contract carrier permit and based upon the application therefor and the contract setting out the terms of the agreement between the parties, and particularly the paragraph respecting rates, the Railroad Commission of Texas entered its order granting in part and denying in part said contract carrier application as the same is set forth in Exhibit B of the plaintiff's Bill of Complaint and identified by the reporter in this case as plaintiff's Exhibit No. 2, which said order was dated June 16, 1941, and that portion of the order relating to the rates provided:

"In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate, to be charged by contract carriers the rates prescribed for common carrier motor carriers."

6. Pursuant to said order of the Railroad Commission said Commission did on the 9th day of July 1941 cause to be issued to the plaintiff Steele a contract carrier permit and numbered the same 11,449. A copy of said permit is set forth in plaintiff's Exhibit No. c attached to his bill

of complaint and identified by the reporter in this case as Exhibit No. 3 and the relevant part thereof provides:

"This permit to remain in effect from and after the date hereof, subject to the provisions of Chapter 277 Acts Regular Session of the Forty-Second Legislature, 1931; the further orders of the Commission; and the rules and [fol. 92] regulations of the Railroad Commission of Texas, heretofore prescribed or which may be hereafter prescribed under and pursuant to the authority conferred upon it by law."

I find that all of said orders by the Railroad Commission are regular on their face.

7. That subsequent to the time the Railroad Commission issued to plaintiff Contract Carrier Permit No. 11449 plaintiff and the defendant entered into a supplemental contract which was introduced in evidence in this case and marked as the defendant's Exhibit No. 3 which provided that the defendant would pay and the plaintiff would receive for his services in hauling the goods and merchandise of the defendant a rate lower than that prescribed by the Railroad Commission of Texas.

8. That during the period beginning with the first day of August 1941 and to but not including November 1, 1943 plaintiff as such contract carrier continuously transported shipments for defendant over the highways of the State of Texas. By stipulation between the parties and admitted on demand for admissions it was agreed that the defendant actually paid to the plaintiff for the hauling of said products the sum of $44,803.33; that the amount that should have been paid had the rate been applied as prescribed by the Railroad Commission of Texas in its Class and Commodity Tariff No. 1A and as agreed to in paragraph 13 of the contract quoted hereinabove would have been the sum of $77,814.98, or a difference of $33,011.65, being the sum for which plaintiff sued together with Federal Transportation tax in the amount of $379.74, totaling the sum of $33,390.99.

That the amount now due the plaintiff by the defendant, including interest as it has accrued at the legal rate and transportation tax is the sum of $37,884.82.

[fol. 93] 9. The defendant is a foreign corporation, organized under the laws of the State of Delaware with a permit to do business within the State of Texas. The plaintiff is a resident citizen of Texas with his home in Wichita Falls within the Northern District of Texas; that diversity of citizenship exists and the required amount is involved, and that this Court has jurisdiction of the parties and the subject matter.

10. The plaintiff operated his trucks from Wichita Falls over the highways of Texas in intrastate movement only within a radius of 150 miles of Wichita Falls; the plaintiff hauled in excess of 28,000,000 pounds of the defendant's products during the period in question; the plaintiff operated over the same highways as the common carrier motor carriers operating within the same *area*. There are five or more common carrier motor carriers operating in and out of Wichita Falls who travel the same highways as did the plaintiff in his operation; the common carrier motor carriers owner and operated substantially the same type and kind of equipment as did the plaintiff; the common carrier motor carriers were prepared to haul and did haul the same type and kind of products for the defendant as did the plaintiff; the common carrier motor carriers held themselves out as being able to transport all of the products of the defendant and had been engaged in soliciting such business for many years prior to and during the period involved in the plaintiff's operation; the transportation service rendered by the common carrier motor carriers within the territory involved performed substantially the same type of transportation service as did the plaintiff for the defendant and said common carrier motor carriers were prepared to haul all of the products hauled by the plaintiff for the defendant; said common carrier motor carriers would have hauled all of the products in practically the same type of trucks over the same highways from the same points of origin to the same points of [fol. 94] destination; that all tonnage moved by the plaintiff for the defendant could have been moved by common carrier motor carriers.

11. I further find that the defendant's proof on the trial of this cause did not sustain its allegation of estoppel. The defendant's Exhibit 3 is a copy of the supplemental

contract which provided that the plaintiff would charge and the defendant would pay a rate less than the one prescribed by the Railroad Commission and I find the terms of this contract in direct violation of the orders, rules and regulations of the Railroad Commission; also its terms are in direct violation of the original contract entered into between the parties as concerns rates and in direct violation of the certificate and orders of the Railroad Commission issued relating to the plaintiff's contract carrier permit. Exhibits 4, 5, 6, 7 and 8 related to inter-office correspondence between the defendant and the plaintiff and his attorneys all of which letters were admitted by the Court through a misunderstanding as to their import and purpose and are withdrawn as evidence in this case.

12. I find Steele began hauling for the defendant on August 1, 1941, and terminated October 31, 1943. That plaintiff did and has a right here to rely upon the rates as prescribed by the Railroad Commission. That defendant failed to offer any proof to support its allegations of limitation.

Conclusions of Law

1. The Legislature of Texas pursuant to the Constitution created the Railroad Commission and conferred upon said Commission the authority and duty of regulating all carriers within the State including railroads, busses, common carrier motor carriers and contract carrier motor [fol. 95] carriers: The law relating to contract and common carrier motor carriers is found in Art. 911b Vernon's Civil Statutes. This law is constitutional. Stephenson v. Binford, 77 L. ed. 288.

Section 6aa of Art. 911b provides:

"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

This legislative enactment by the Legislature fixed a minimum rate for contract carriers and thus the Railroad Commission could not fix a rate less than that prescribed by the Legislature.

2. The Railroad Commission has by its orders prescribed rate for common carrier motor carriers and contract carrier motor carriers as disclosed in the findings of fact above. That said rate orders are regular on their face. Further, that the orders issued by the Commission relating to the operation of the plaintiff and the defendant in this case are likewise regular on their face. All presumptions are in favor of the validity of a Railroad Commission order and this is true of a rate order promulgated by said Commission. Railroad Commission of Texas et al v. Uvalde Construction Co. et al, 49 S. W. (2d) 1113.

All of the orders issued by the Railroad Commission affecting this case being regular on their face are not subject to a collateral attack as was attempted by the defendant in this case. Texas Steel Co. v. Fort Worth & [fol. 96] Denver C. Ry. Co., (Tex. Sup. Ct.) 45 S. W. (2d) 794; Greer v. Railroad Commission of Texas et al., 117 S. W. (2d) 142.

3. The Legislature of Texas has provided a complete, simple and adequate remedy for all persons who may be dissatisfied with any order of the Railroad Commission by its enactment of Sec. 20 of Art. 911b, the material part of which provides:

"If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant."

This statute is constitutional and complies with the due process clause of the Constitution. Therefore it is apparent from the record in this case that the defendant has not, 1st, exhausted its remedy with the Commission in that it has not gone back to the Commission for relief; 2nd, the defendant has not appealed from the orders

of the Commission to a District Court in Travis County, Texas, but has attempted to collaterally attack the orders of the Railroad Commission in the United States District Court at Fort Worth. Such an attack cannot be sustained. Alpha Petroleum Co. v. Railroad Commission, 59 S. W. (2d) 364; Burford v. Sun Oil Co., 87 L. Ed. 1424 (Sup. Ct. of U. S.).

4. The supplemental contract entered into between the plaintiff and the defendant concerning rates less than those prescribed by the Railroad Commission was in vio- [fol. 97] lation of the Texas Statutes and the orders of the Railroad Commission and thus said supplemental contract is illegal, unenforceable and void. Morrison v. City of Fort Worth, 155 S. W. (2d) 906 (Sup. Ct. of Texas).

5. The plaintiff based his suit for under charges of rates upon the orders of the Railroad Commission and a valid enforceable contract between himself and the defendant. The plaintiff did not rely upon the supplemental contract as a basis for his cause of action in this case nor was he required to do so. The defendant for a defense relied upon the supplemental contract which as above stated is an illegal and void instrument. St. Louis, I. M. & S. Ry. Co. v. Landa & Storey, 187 S. W. 358.

6. Relying upon the supplemental contract which provided a rate less than that fixed by the Railroad Commission, the defendant urged that as a matter of law the Railroad Commission was without power to fix rates for contract carriers until the Commission found that the services to be performed by the plaintiff for the defendant were substantially the same and in competition with common carrier motor carriers. Upon the earnest insistence of the defendant's counsel the Court allowed evidence to be introduced and the questions submitted in the form of special issues to the jury. The Court then believed that such a position was without merit. The Court allowed the issues to be submitted only in the thought, if the jury should find for plaintiff on such issues, it would likely end the litigation. This Court cannot assume that the Railroad Commission did not have before it all of the essential and necessary facts upon which to base its order and to issue a permit in favor of the plaintiff. This Court cannot assume that the Railroad Commission did not have

the facts before it in determining and foreclosing the fact question of competition and substantially of service. Such [fol. 98] a finding by the jury that the services as actually performed by the plaintiff for the defendant was not substantially the same or that it was not in competition with common carrier motor carriers was contrary to the greater weight of the testimony. The services rendered by the plaintiff for the defendant were substantially the same and in competition with common carrier motor carriers.

Rate making is a legislative function which the Legislature of Texas has delegated to the Railroad Commission and this pronouncement is supported in the case of Railroad Commission v. Uvalde Construction Company, supra, wherein the Court said:

"It has been repeatedly held, and is not controverted by appellees, that fixing freight rates is a legislative or quasi legislative function, vested exclusively in the Railroad Commission, and one that cannot be exercised by the Court." Citing many cases.

8. The defendant cannot here complain that the rate orders of the Commission were not supported by findings of the Commission. United Fuel Gas Co. v. Railroad Commission (U. S. Sup. Ct.), 278 U. S. 300-308; 73 L. Ed. 391-395.

9. I find the two-year statute of limitation does not apply as was pleaded by defendant.

10. The defendant having failed to sustain its allegations of estoppel as set forth in the findings of fact, I hold plaintiff was not estopped and could not be estopped as a matter of law from asserting such rights as were granted to him by the orders of the Railroad Commission and the laws of Texas.

[fol. 99] 11. After the jury had returned its special verdict the Court gave them additional instructions and then and there expressed the Court's views on the facts and the law questions involved in this case. Reference is here made to such instructions, which are a more complete and comprehensive statement of the Court's views of the facts and the law in this case.

Entered this 26th day of December, 1944.

James C. Wilson, Judge, United States District Court, Northern District of Texas.

DEFENDANT'S OBJECTIONS

Defendant seasonably objected to the action of the Court in filing the above and foregoing Findings of Fact and Conclusions of Law and to each Finding of Fact and Conclusion of Law for the following reasons:

1

Because Findings of Fact in this case by the Court are not proper, necessary or required under the laws of the United States and Rules of Federal Procedure, the case having been submitted to the jury and the jury having made fact findings which constituted their special verdict, which was not set aside; and the Court not having rendered judgment on the verdict but in effect rendered judgment notwithstanding the verdict on law questions and not fact questions.

2

Because Conclusions of Law are not proper, necessary or required in this case under the laws of the United States and the Rules of Federal Procedure.

[fol. 100]

3

Because all issues of fact other than the two submitted to the jury were conclusively established favorably to defendant by uncontradicted evidence and Findings of Fact thereon are not proper.

4

Because so much of Finding of Fact No. 5 which states a representative of defendant appeared before the Railroad Commission on the application for a permit is not supported by the record and is immaterial.

5

Because so much of Finding of Fact No. 7 as stated defendant entered into a supplemental contract with plaintiff, marked Defendant's Exhibit 3, subsequent to the issuance of the contract carrier permit, providing for less compensation at a lower rate than prescribed by the Railroad Commission of Texas, is erroneous in that under the evidence there was no Railroad Commission rate; said sup-

plemental contract and the agreement expressed therein was under the evidence shown to have been a part of the original agreement and a part of the entire agreement between the parties.

6

Finding of Fact No. 8 is erroneous in that defendant did not agree that it should have paid under the Railroad Commission rates or under Paragraph 13 of the contract a sum greater than it did pay. The admissions of defendant in this regard are of record and speak for themselves.

[fol. 101] 7

Finding of Fact No. 10 is erroneous and contrary to the facts and is an attempt on the part of the Court to find facts on an issue submitted to the jury and contrary to the jury's verdict, the jury having specifically found and the evidence having shown that the service performed by plaintiff was not substantially the same as the service performed by common carrier motor carriers and that plaintiff was not operating in competition with such common carrier motor carriers over the highways of Texas.

8

Finding of Fact No. 11 on the issue of estoppel is erroneous, the evidence having conclusively established estoppel against plaintiff as a matter of law; also such finding is erroneous in so far as it relates to the supplemental contract, there being no evidence under which the Court is authorized to find such contract to be illegal in violation of the orders, rules and regulations of the Railroad Commission of Texas and of the original contract, the evidence conclusively establishing in this connection that both the original and supplemental contract constituted one and a part of the same agreement; the finding is further erroneous in which the Court states certain letters marked Exhibit 4, Exhibit 5, Exhibit 6 and Exhibit 7, were admitted under a misunderstanding as to their import and purpose and are withdrawn, such finding being contrary to the record and the Court being without power after the conclusion of the trial of the case to withdraw any evidence.

9

Finding of Fact No. 12 is erroneous and contrary to the facts and the law and particularly is the finding erroneous [fol. 102] in which the Court states defendant failed to offer any proof in support of limitation, the record showing to the contrary. .

10

Each and all of the material Findings of Fact are erroneous, improper and contrary to the evidence.

11

Each and all of the Conclusions of Law are erroneous and improper Conclusions of Law.

12

Conclusion of Law No. 6 involves a mixed question of law and fact and is in effect a fact finding upon issues submitted to the jury and contrary to the findings of the jury and likewise contrary to and unsupported by the evidence. The jury found and the evidence supported the findings that plaintiff's operations were not in competition with the operations of common carriers over the highways of the state and that the services performed by plaintiff were not substantially the same as services performed by common carriers. The Court's statement that the findings of the jury in these regards are contrary to the greater weight of the testimony is an attempt on the part of the Court to invade the province of the jury, who were the exclusive judges of the greater weight of the testimony. Furthermore, such statement is an erroneous statement of fact. The further statement by the Court in Conclusion 6 that the services rendered by plaintiff for defendant were substantially the same and in competition with common carrier motor carriers is an erroneous conclusion of law and fact or mixed law and fact and contrary to the evidence, the jury's findings and the law.

[fol. 103] 13

Conclusion of Law No. 3 is erroneous in each and all of the respects therein mentioned. The statute, if construed and enforced as sought to be enforced by the Court

herein, is unconstitutional in the several respects asserted in defendant's answer. There was no obligation on the part of defendant to seek any remedy before the Commission and no obligation or right on its part to appeal from the orders of the Commission to a District Court of Travis County; it was not a party to the proceeding. Defendant's answer did not present a collateral attack upon the orders of the Commission. Defendant challenged the power of the Commission to act, if it did, as distinguished from the improper exercise of power, the Commission acting, if it did act at all, under a conditional and limited grant of power and it was incumbent upon plaintiff to establish the facts necessary to the exercise of power.

14

Conclusion of Law No. 5 is erroneous, among other reasons because the supplemental agreement was a part and parcel of the same agreement as the so-called original agreement. One could not be sustained without the other.

15

Conclusion of Law No. 8 is erroneous.

16

Conclusion of Law No. 9 is erroneous, limitation having been established as a matter of law.

17

Conclusion of Law No. 10 is erroneous. Estoppel against plaintiff was established conclusively as a matter of law. [fol. 104] Particularly was plaintiff estopped from denying the facts relating to his operations not being substantially the same as those of common carriers and not being in competition with the operation of common carriers over the highways of Texas.

The specific objections were made without waiving or intending to waive any of the general objections. Each and all of the above and foregoing objections were considered by the Court and by the Court overruled, to which the defendant, General Mills, Inc., duly excepted.

This the 26 day of December, A. D. 1944.

James C. Wilson, United States District Judge.

In United States District Court

Final Judgment—Filed December 27, 1944

[Title omitted]

On the 11th day of December, 1944, came on to be heard the above numbered and entitled cause. The plaintiff appeared in person and by attorneys and announced ready for trial. The defendant appeared by its officers and attorneys and announced ready for trial. A jury having been demanded there came Mickey Maguire, foreman, and eleven other qualified jurors who were duly sworn and impaneled. The case was then heard by the Court upon the pleadings, evidence, demands for admissions and admissions on file and various motions filed by the respective parties. Whereupon the Court submitted to the jury two [fol. 105] special issues, and the jury's answers thereto, constituting their special verdict, were as follows:

"No. 1

Do you find from a preponderance of the evidence in this case that the operations of plaintiff Steele under his contract with defendant were in competition with common carriers over the highways of Texas? Answer "yes" or "no."

Answer: No.
(Signed) Mickey Maguire, Foreman."

"Do you find from the evidence in this case that Plaintiff Steele rendered substantially the same service as that rendered by common carriers, during the time, and in the area of transportation here involved? Answer "yes" or "no."

Answer: No.
(Signed) Mickey Maguire, Foreman."

The special verdict of the jury as aforesaid was returned into Court, read in open Court and ordered filed. The defendant moved for judgment upon the verdict of the jury as aforesaid. Thereupon the Court announced he would act favorably upon the plaintiff's motion for an instructed verdict filed at the conclusion of the evidence and which had been taken under advisement and that plaintiff was entitled to judgment non obstante veredicto.

Thereupon the Court, without setting aside the special verdict, gave the jury the following instruction:

[fol. 106] "Gentlemen of the Jury: You are instructed to return a verdict for the plaintiff."

Whereupon, pursuant to the instructions of the Court, the jury returned the following verdict:

"We, the jury, find for the plaintiff.
(Signed) Mickey Maguire, Foreman."

to all of which the defendant in open Court excepted.

It is, Therefore, Ordered, Adjudged and Decreed that the plaintiff, Leo H. Steele, do have and recover of and from defendant, General Mills, Inc., judgment in the principal sum of $37,884.82, together with interest thereon from this date at the rate of six per cent (6%) per annum, together with costs of suit, for all of which let execution issue as provided by law, and to all of which defendant, General Mills, Inc., in open Court excepts.

It is further ordered that the special verdict of the jury in answer to the two special issues submitted by the Court is not set aside but effect is not given thereto in this judgment because deemed immaterial by the Court.

The motions of the defendant, General Mills, Inc., for a directed verdict, the first made when plaintiff rested his main case and the second made at the conclusion of all the testimony in the case, with the reservations set forth therein, having been under consideration by the Court until this date, be and each of such motions is hereby overruled, to which defendant excepts.

The defendant's motion for a judgment on the special verdict of the jury is also hereby overruled, to which defendant excepts.

[fol. 107] Done and Entered in Open Court at Fort Worth, Texas, on this the 26 day of December, A. D. 1944.

James C. Wilson, United States District Judge for the Northern District of Texas.

Approved as to Form Only: Culbertson, Morgan, Christopher & Bailey, by Cecil A. Morgan, Attorneys for Plaintiff. Miley, Hoffman, France & Johnson, Cantey, Hanger, McMahon, McKnight & Johnson, by Alfred McKnight, Attorneys for Defendant.

In United States District Court

Notice of Appeal of the Defendant, General Mills, Inc.

Filed January 8, 1945

[Title omitted]

General Mills, Inc., defendant in the above entitled cause, does hereby give notice that it appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in the above entitled cause as of and under date of December 26, 1944, filed and entered [fol. 108] on the clerk's record on December 27, 1944, in favor of plaintiff and against this defendant in the principal sum of Thirty-seven Thousand, Eight Hundred and Eighty-four and 82/100ths Dollars ($37,884.82), together with interest thereon from said date at the rate of six per cent (6%) per annum, and all costs of the suit.

Miley, Hoffman, France & Johnson, (Miley, Hoffman, France & Johnson)
First National Bank Building,
Oklahoma City, Oklahoma.
Cantey, Hanger, McMahon, McKnight & Johnson,
(Cantey, Hanger, McMahon, McKnight & Johnson)
Attorneys for Defendant, General Mills, Inc.
Sinclair Building,
Fort Worth, Texas.

In United States District Court

Supersedeas Bond—Filed January 8, 1945

[Title omitted]

Know All Men by These Presents:

That we, General Mills, Inc., as Principal, and Central Surety & Insurance Corporation of Kansas City, Missouri, as Surety, are held and firmly bound unto Leo H. Steele, in the sum of Forty-one Thousand ($41,000.00) Dollars, to be paid unto the said obligee, his representatives or assigns and to the payment of which, well and truly to be made, we bind ourselves, our successors, trustees and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of December, 1944.

[fol. 109] Whereas the above named, General Mills, Inc. is prosecuting an appeal to the Circuit Court of Appeals of the United States in and for the Fifth Circuit to reverse the judgment rendered in the above entitled action by the United States District Court for the Northern District of Texas, Fort Worth Division;

Now Therefore the condition of this obligation is that if the above named, General Mills, Inc. satisfies the judgment against it in full, together with cost, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfies in full such modifications of the judgment and such cost, interest and damages as the above named Appellate Court may adjudge and award against it, then this obligation shall be void, otherwise to remain in full force and effect.

Dated this 28th day of December, 1944.

General Mills, Inc., by J. S. Hargett, Principal (Seal); Central Surety & Insurance Corporation of Kansas City, Missouri, by W. Lewis Miller, Atty.-in-Fact. (Seal.)

Attest: J. B. Colfix, Asst. Secry.

Surety

I hereby approve the foregoing bond and surety to operate as a supersedeas, this 8 day of January, 1945.

James C. Wilson, Judge of the United States District Court for the Northern District of Texas, Fort Worth, Texas.

[fol. 110] In United States District Court

Order Granting Transmitting of Plaintiff's Exhibit 6 and Defendant's Exhibit 9 to Circuit Court of Appeals In Their Original Form—Filed January 9, 1945.

[Title omitted.]

It appearing to the Court that plaintiff's Exhibit 6 and defendant's Exhibit 9 should be sent to the Circuit Court

of Appeals for the Fifth Circuit in their original form in lieu of being copied in the transcript of the record:

It is Hereby Ordered that such exhibits be transmitted to the Circuit Court of Appeals for the Fifth Circuit in their original form, to be returned to this Court when deemed proper by said Circuit Court of Appeals, and the clerk of this Court is hereby directed to transmit said original exhibits accordingly.

Fort Worth, Texas, January 9, A. D. 1945.

James C. Wilson, United States District Judge.

OK. Culbertson, Morgan, Christopher & Bailey, by Cecil A. Morgan, Attorneys for Plaintiff; O. K. Cantey, Hanter, McMahon, McKnight & Johnson, by Alfred McKnight, Attys. for Deft.

[Vol. 111] In United States District Court

Statement of Evidence—Filed January 8, 1945

[Title omitted]

Appearances:

Culbertson, Morgan, Christopher & Bailey, (By Mr. Morgan and Mr. Christopher), Fort Worth, Texas, Attorneys for Plaintiff

Cantey, Hanger, McMahon, McKnight & Johnson, (By Alfred McKnight), Fort Worth, Texas, and Charles E. France, Oklahoma City, Oklahoma, Attorneys for Defendant.

Transcript of proceedings had on the trial of the above entitled cause, before the Honorable James B. Wilson, Judge, with a jury, beginning on December 11, 1944, at Fort Worth, Texas.

(After announcing ready and before securing a jury.)

Renewal of Motion for Summary Judgment

Mr. Morgan: If the Court please, we would like to renew our motion for a summary judgment. The defendant has filed additional pleadings, and for the purpose of the record we would like for it to be understood that we at this time

are urging our motion for summary judgment for all of the reasons stated in the motion. Will the Court carry it along with the case for consideration?

The Court: Yes, that is what I intended to do.

[fol. 112] (After an announcement of ready by both sides a jury was selected to try the case.)

The Court: All right, read your pleadings.

Whereupon the plaintiff, through his counsel, read his first amended original complaint to the jury, and the defendant, through its counsel, read its first amended original answer to the jury. Immediately before defendant's counsel read Exhibits 4, 5, 6, 7 and 8, attached to its answer to the jury, the following proceedings were had:

The Court: I overrule the objection made by the plaintiff to the reading of these letters attached to the pleadings. I understand the point was made that the pleadings are not evidence. These letters were never introduced. The jury would have no right to consider them. It is simply what the parties say the facts are, and what they are depends on the jury's decision, and going to this question raised by the defendant. The objection will be overruled. I understand the plaintiff made the objection to the reading of the exhibits attached to the pleadings by the defendant—you can go ahead.

Mr. Morgan: Should we now say what our objections are?

The Court: Yes.

Mr. Morgan: First, we object on the ground that it is irrelevant and immaterial. The first communication is a privilege communication between lawyers and clients and not addressed to the defendant in this case. It is a private communication between a lawyer and his client.

[fol. 113] Second: This is an attempted collateral attack on the rate order established by the Railroad Commission of Texas, from which no appeal has been made, and from which no appeal has been attempted, and these records, under no circumstances can be construed as an appeal from that order.

The Court: That is the very point I was going to pass on. You say contrary to a valid and existing order. That is what you say the facts are.

Mr. Morgan: That is admitted.

The Court: They are admitting that the rate fixed by the commission was binding?

Mr. Morgan: That is true, they admit it is a valid and subsisting order but they contend it does not apply to them.

The Court: We have got to hear all of your facts that you have in mind before we can tell whether it is applicable.

Mr. Morgan: This is a collateral attack not only on a rate order fixed by the commission, but a collateral attack on an order issued by the Commission granting a permit, and is a collateral attack on the permit itself, from which no appeal has been made as to either.

We further object on the ground that this is an effort to bolster up and substantiate an illegal contract, one made in violation of law, and one that is not enforceable.

[fol. 114] The Court: You may be right about that, I do not know. I am not going to try *to try* this case while we are undertaking to hear the pleadings.

Mr. Morgan: I appreciate that, but I want to make a record.

We further object on the ground that these ex parte communications referred to, in the exhibits, which counsel is attempting to read to the jury, are an effort to vary the terms of a written contract, either the first contract entered into or the second contract entered into, which we think is an illegal contract, and in either event it is an effort to bolster up the contract, and this is an attempt to vary the terms of the contract itself, which you cannot do by ex parte statements of a lawyer to his client.

And we further object for the reason that legal conclusions and opinions expressed by the counsel are not in fact questions upon which an estoppel may be based. I understood by counsel that he is relying upon an estoppel, and I understand the rule of estoppel is that you cannot have an estoppel on the legal conclusions of any one, you have got to have the facts. For those reasons, we would like to state our objections to his reading them to the jury.

The Court: All right.

The objections as stated were made and overruled by the Court and an exception reserved by the plaintiff.

Thereupon the letters referred to, Exhibits 4, 5, 6, 7 and 8, to defendant's amended answer, were read and presented to the jury as a part of the answer. After the pleadings were read the following proceedings were had:

[fol. 115] MOTION TO STRIKE

Mr. Morgan: If the Court please, in the interest of time, I would like now to file a motion to strike all of this, since he has read it (referring to the letters) for each and all of the reasons heretofore assigned, and for the further reason, according to their own allegation in their pleadings they were parties to this contract and you cannot estop someone else from making a contract with you in which you are a party, if you are both engaged in an illegal transaction, and there can be no doctrine of estoppel, and we move the Court, in addition to that and seriously urge that the Court instruct the jury that the pleadings on the part of either of the parties, whether plaintiff or defendant, are not evidence and are not to be considered by the jury as evidence in this case.

The motion was overruled by the Court, to which plaintiff excepted. Thereupon the following evidence was introduced:

The Court: All right, call your witnesses.

PLAINTIFF'S TESTIMONY

Mr. Morgan: We first would like to offer in evidence some of these documentary instruments here. I think we will get along faster that way.

We first offer in evidence, if your honor please, the original contract entered into between Leo H. Steele, Plaintiff, and General Mills Inc., Defendant, which is marked Exhibit A, attached to the pleadings, but in this case at this time is marked Plaintiff's Exhibit No. 1, and this contract bears date August 26, 1940 and is as follows:

[fol. 116] PLAINTIFF'S EXHIBIT NO. 1

Contract

This Contract and Agreement, made and entered into this 26th day of August, 1940, by and between Leo H. Steele, an individual of Wichita Falls, Texas, hereinafter known as first party, and General Mills, Inc., a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, and duly authorized to transact business in the State of Texas, hereinafter known as second party, Witnesseth:

Whereas, first party is engaged in business as a contract motor carrier for the transportation of merchandise and property in the State of Texas; and,

Whereas, Second party is engaged in the milling business and the manufacture of flour, feed and mill products and in the business of selling and distributing flour feed, grain and other mill and grain products, hereinafter referred to as "products,' and the term "products" for the purposes of this contract shall include bags and all other mill accessories incidental to the manufacture of flour, feed and other mill products; and

Whereas, first party desires to secure as an independent contractor from second party the business of delivering or transporting within the State of Texas, by motor carriers such products of second party as it may tender to first party for delivery or transportation, upon the terms and conditions hereinafter set forth.

Now, Therefore, premises considered and in consideration of the mutual covenants and agreements hereinafter set forth, it is agreed as follows, to-wit:

1. First party, as an independent contractor, hereby agrees to deliver or transport products tendered for shipment by second party according to its requirements and to such consignees or places in the State of Texas as second [fol. 117] party may designate and to procure, furnish and maintain available at its sole cost and expense, all necessary and proper motor trucks and trailers, herein referred to as "transporation units" sufficient to properly and expedition-ly deliver or transport such products according to the requirements of second party.

2. First party agrees that its transportation equipment shall be in first class condition and shall be maintained in such condition; that the truck or trailer bodies shall be suitable for the delivery or transportation of the products of second party and shall be designed, built or furnished according to specifications approved by second party.

3. First party has investigated the volume of the transportation business of second party and in this connection it is mutually agreed that the initial number of transportation units, consisting of motor truck and trailer, to be furnished by first party shall be six (6) and thereafter first party agrees upon the request of second party to increase

the number of such transportation units as the business offered by second party may require and at all times to furnish adequate transportation facilities for the delivery or transportation of the product of second party within the State of Texas according to its requirements.

4. First party agrees that the transportation units furnished and to be furnished as aforesaid shall be reserved by first party for the exclusive use by it in the transportation of the products of second party and such transportation units shall not be used by first party for the transportation of property or merchandise of any third party.

5. First party shall employ all necessary drivers and operators of said transportation units who shall be competent and qualified drivers and operators, together with [fol. 118] mechanics, maintenance men and other necessary employees for the proper carrying out of this contract, at its sole cost and expense. All of said employees shall at all times be and remain the employees of first party, acting under its exclusive control and direction, and first party shall have full power and authority to discharge and employ the same and to control the operation and maintenance of all transportation units used under this contract. It is mutually agreed that second party shall have no control over the operation or maintenance of such transportation units or such employees who shall never be considered or treated as the agents, servants or employees of the second party.

6. First party shall be and remain responsible for all products delivered to first party by second party from the time of the receipt and taking possession thereof at the loading docks of second party or the point of origin for delivery of such products for transportation until the delivery thereof to the consignee or place of delivery. Second party shall have no control over such property while in transit, excepting only the right reserved unto second party to stop such cargoes in transit and to designate or change the destination thereof.

7. First party agrees to carry out and perform fully faithfully and diligently all of its obligations and agreements in this contract contained, and agrees to handle, deliver or transport promptly and with due care and caution the products of second party delivered to first party

hereunder, except that first party shall be excused for delays in the delivery or transportation of such products due to strikes or labor trouble or other unavoidable cause or casualty over which first party has no control, but in the handling, delivery or transportation of such products first party agrees to protect the same at all times against injury or damage from moisture, insects or other infesta-[fol. 119] tion, strikes, or riots, foreign odors or injurious contacts. First party further agrees to deliver such products to the consignee or place of delivery in as good condition as when received from second party and to properly unload such products at the place of delivery provided by the consignee or as otherwise specified by second party.

8. Second party shall daily, or as its transportation requirements arise, notify first party of products to be delivered or transported and first party shall promptly and expeditiously furnish transportation units to handle the same.

9. It is contemplated that in certain instances products of second party shall be consigned for delivery upon cash payment by the consignee or under certain special instructions to be contained in the bill of lading or other written memoranda and first party agrees to faithfully account for and promptly pay over unto second party all money or other considerations collected by first party upon the delivery of products of second party where first party has been specially instructed and authorized to collect such money or other considerations. First party shall not make and shall have no authority to make or receive payment from consignees for products of second party unless specificially instructed and authorized so to do in the bill of lading or other written memoranda. First party agrees to procure, pay for and maintain a fidelity bond, written by an insurance company, approved by second party, guaranteeing the prompt payment to first party of all money or other considerations collected by its agents, servants or employees from consignees of products of second party.

10. First party agrees to procure and maintain, at its sole cost and expense, insurance for each and every transportation unit used and employed in the performance of this contract covering public liability in an amount not [fol. 120] less than $100,000.00 for the injury or death of

any one person and not less than $200,000.00 for the injury or death of more than one person in any one accident, and not less than $5,000.00 property damage, together with employers liability insurance covering liability for injury to or death of employees of first party with coverage of not less than $10,000.00 for the injury to or death of any one employee and workman's compensation insurance as required by law. Such insurance shall be secured from insurance companies approved by second party and shall be written in such form as not only to insure and protect first party as an independent contractor but also as a matter of precaution to insure and protect second party from any contingent liability.

11. First party agrees to promptly comply with all laws, rules and regulations applicable to the conduct of said business as a contract motor carrier, including and without excluding any other applicable law, rule or regulation, those of the State of Texas and any department or governmental sub-division thereof all general laws and applicable ordinances or regulations of cities or towns to or through which products of second party may be delivered or transported hereunder.

12. First party shall be solely liable and responsible for, and agrees to pay promptly all costs and expenses of every kind or character arising out of, resulting from or incident to the business conducted under this contract and the operation and maintenance of the transportation units employed or used in the performance of this contract.

13. It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or [fol. 121] tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder.

14. It is mutually agreed that second party may specify the manner in which transportation units shall be painted and second party is granted the right and privilege to require advertising or other written matter painted or otherwise placed on the transportation units. First party

shall have painted upon each motor truck and trailer in a suitable manner to be approved by second party, an inscription showing that such transportation units are owned and operated by first party.

15. It is mutually agreed that the terms of this contract shall be for a period of three years from August 26th, 1940, provided that second party may by written notice addressed and delivered or mailed to first party at its principal place of business at Wichita Falls, Texas, terminate this contract upon the sixtieth day after the delivery or mailing of such notice, and thereupon all obligations of second party hereunder shall cease and terminate with the exception of the obligation of second party to pay any amounts due under this contract up to and including the date of termination.

16. First party agrees to indemnify and hold second party harmless of and from all claims, demands, damages and losses of every kind or character arising out of, resulting from or incident to the performance of this contract and the handling delivery or transportation of products received by first party from second party under this contract including but not excluding other claims, demands, damages or losses, damages to such products.

[fol. 122] 17. It is mutually agreed that any notice, statement or communication to be given second party by first party may be personally delivered to an officer of second party at Oklahoma City, Oklahoma, or sent by registered United States mail, addressed to second party at Oklahoma City, Oklahoma, and that any notice, statement or communication to be given to first party by second party may be delivered personally to an officer of first party or sent by registered United States mail, addressed to first party at Wichita Falls, Texas.

18. This contract shall not be assigned or transferred by first party and no substitution shall be made for first party without the written consent thereto by second party, and in the event of any attempt to assign or transfer this contract or substitute any other party for first party, then the second party may immediately terminate and cancel this contract, but termination of this contract whether by expiration of the term above provided or upon the prior termination thereof, shall not in any wise

relieve or release first party from full responsibility or liability for any of its obligations theretofore accrued hereunder, including but not excluding any other obligations, the obligation to complete the delivery or transportation of any shipments then in transit.

Executed in duplicate at Wichita Falls, Texas, the day and year first above set forth.

(Signed) Leo H. Steele, First Party; General Mills, Inc., (Signed) by J. P. Hargett, Second Party.

Mr. Morgan: If the Court please, this contract bears date of the 26th of August, 1940; Mr. McKnight tells me [fol. 123] that is not in fact the correct date, so whatever the correct date is, we are perfectly willing for that to be inserted, because I do not know about the date.

Mr. McKnight: It should be April, 1941.

Mr. Moran: Whatever Mr. McKnight tells you, that is agreeable to me.

We come now to paragraph No. 13, and this is one about which there is a controversy and it reads:

"13. It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

Mr. Morgan: I wanted to call attention to that paragraph 13.

Now, plaintiff next offers in evidence, your honor, a copy of the order granting in part and denying in part contract carrier application, which order is attached to the petition and marked Exhibit No. 2.

Mr. McKnight: For the purpose of the record, we wish to make objection to so much of that order as might be construed as fixing rates on the same ground of invalidity that we have set up and alleged in our answer, which I assume it is not necessary to repeat. I would like to have that objection.

[fol. 124] The Court: It will be overruled.

Mr. McKnight: We except.

Mr. Morgan: Exhibit No. 2, above introduced is as follows:

PLAINTIFF'S EXHIBIT No. 2

Order Granting in Part and Denying in Part Contract Carrier Application.

Railroad Commission of Texas
Motor Transportation Division
Motor Carrier Docket No. 9705

Application of Leo H. Steele, DBA, Steele Distributing Co. for a Permit Authorizing Operation of a Contract Carrier Motor Carrier Service Transportation Goods, Wares and Merchandise, Including Feed, Flour, Cereals and Other Mill and Grain Products, for General Mills, Inc. from Their Mills Located in Wichita Falls and Amarillo, Texas, to Various Towns and Communities Not Now Served by a Common Carrier, Also Grovery Stores, Feed Stores and Other Businesses Commonly Known as "Country Stores" Throughout the State of Texas: Also With Authority in Emergencies to Make Delivery to Any and All Cities, Towns and Communities Within the State of Texas, Using Any and All Highways in the State to and from and Between Any and All Points in Delivering the Goods, Wares and Merchandise of This Shipper, Using Twelve Trucks.

[fol. 125] Austin, Texas, June 16, 1941.

Order

By the Commission:

On June 9, 1941, the Railroad Commission of Texas took up for consideration the above styled application which was filed on August 27, 1940, and after due and legal notice of the time and place of hearing had been given to the applicant, to all interested parties and to the public generally, was heard on various dates beginning November 2, 1940, and completed May 2, 1941, at the State Capitol in the city of Austin, Texas.

The Commission Finds from the evidence and its records that the applicant proposes the operation of a contract carrier motor carrier service transporting goods, wares and merchandise for General Mills, Inc., from its mills located in Wichita Falls and Amarillo, to various

points, throughout the State of Texas, and using in said operation twelve trucks.

The Commission Finds from the evidence that heretofore this shipper has used its own trucks in making deliveries by truck from its mills at these two points, and that the shipper usually had in use, six of its own private trucks at each of its mills. The Commission further finds from the evidence that the usual territory served by the private trucks of this shipper was limited, as a rule, to a radius of one hundred fifty miles from the mills located at Amarillo and Wichita Falls.

The Commission, in reciting these facts, is not taking into consideration as an element for the need of this service, the fact that the shipper has been using its own trucks, but merely to point out that the ordinary radius in which the shipper found it necessary to use its own trucks was not statewide but within a radius of one hundred fifty miles of its mills.

[fol. 126] The Commission Further Finds from the evidence that the shipper transports between 85 and 90 per cent of its total tonnage by mail, and that it proposes to continue to transport tonnage by rail as in the past, and that about the only transportation that the shipper has made by common carrier truck lines is packaged food items, mill supplies, bags and other small shipments.

The Commission Finds from the evidence that in shipping flour and similar products by truck, it is sometimes commingled with other commodities, some of which contaminate the mill products, and that it is more practical for the shipper in shipping by truck to have the service of a contract carrier whereby its commodities will be handled more carefully and will be protected from contamination. The applicant proposed the principal operation would be within a one hundred fifty mile radius of the two points at which the mills are located, but proposed to have statewide authority which the applicant, in his own discretion and judgment would only use in emergencies.

The Commission is of the Opinion that it should not grant a statewide operation for emergency use when the time and purpose of the use of that operation would be left entirely to the discretion of the contract carrier or his shipper and over which emergency use the commission

could not possibly retain any regulation or control once the authority was granted, and the Commission is further of the opinion that in this case, such a statewide operation would divert tonnage from the common carriers to which they are entitled.

The Evidence Further Shows That testimony was adduced to show that the shipper could not successfully operate under a service such as is proposed for a greater radius than one hundred fifty miles, and for such emer- [fol. 127] gency shipments as might arise beyond that radius, the common carrier rail line and truck lines are available to transport such quantities of tonnage as described in the hearing.

The Commission, after carefully considering the evidence, the laws and its own rules and regulations, is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier; and that the proposed operation of the applicant as a contract carrier within a radius of 150 miles of Wichita Falls, and within a radius of 150 miles of Amarillo, will not impair the efficient public service of any authorized common carrier or common carriers now adequately serving the same territory. In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers.

The Commission Further Finds from the evidence introduced at the hearing that the Highways proposed to be used by the applicant, are of such type of construction and in such state of repair and subject to such use as to permit the use of the equipment sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes.

The Commission Further Finds from the evidence introduced at the hearing that the applicant is financially able and capable of rendering the service proposed and that the equipment proposed to be used by the applicant complies with the rules and regulations of the Commission with respect to safety, dimensions, etc. Therefore, the Commission is of the opinion that the application should be granted in part. Accordingly, it is

[fol. 128] Ordered by the Railroad Commission of Texas that the application of Leo H. Steele, dba, Steele Distributing Company, for a permit authorizing operation of a contract carrier motor carrier service be, and the same is hereby granted as follows:

To transport goods, wares and merchandise, including flour, feed and other mill and grain products, for General Mills Inc., from their mill located at Wichita Falls, Texas, to points and places within a radius of 150 miles thereof; and from its mill located at Amarillo, Texas, to points and places within a radius of 150 miles thereof, and from such points and places within the radius described to the mill located within the radius and using in said operation twelve trucks, but the applicant is prohibited from transporting the above commodities over the following restricted highways:

U. S. Highway No 80 from Mineral Wells to Texarkana via Fort Worth and Dallas;

U. S. Highway No. 77 from Gainesville to Hillsboro via Denton and Dallas;

U. S. Highway No. 75 from the Oklahoma Line to Galveston via Dallas Corsicana and Huntsville.

This Permit is to be limited strictly to the transportation of the above described property, from and to the points and radius set out above, and for the firm named, only, and to be transported only when sold F. O. B. the purchaser's premises.

All Equipment to be operated under authority of this permit is to be restricted exclusively to that owned by the holder of such permit and shall not exceed Twelve Trucks.

It is Further Ordered that, upon compliance with insurance regulations and payment of all taxes and fees by the applicant, and after this order has become final, Con-[fol. 129] tract Carrier Permit be issued forthwith, authorizing the operation of a contract carrier motor carrier service in accordance with and to the extent authorized by this order only, and subject to the same limitations and restrictions as contained herein.

It is Further Ordered by the Commission that this order shall not be final and become effective until twenty days after it is actually signed by the Commission; provided,

however, that if exceptions to the order be filed by any party at interest within such twenty-day period, this Order shall be stayed, and the Commission will consider the exceptions and, if sufficient reason appears therefor, the Commission will grant such review or make such orders or hold or authorize such further hearings or proceedings in the premises as may be necessary or proper. Exceptions to the order as to matters claimed to have been erroneously decided, either as to statements of fact or matters of law, must be specific. If exception is taken to matters of law, must be specific. If exception is taken to matters of law or conclusions, the points relied upon must be stated separately and clearly. If exception is taken to any statement of fact, reference must be made to the pages or parts of the record relied upon. Any party filing exceptions shall furnish copies of such exceptions to all parties of record in the case, or to their attorneys, and shall file four copies with the Commission.

It is Further Ordered that all authority not herein granted is hereby especially denied.

Railroad Commission of Texas, Ernest O. Thompson, Chairman; Jerry Sadler, Commissioner; Olin Culberson, Commissioner.

[fol. 130] Attest: C. F. Petet, Secretary.

HS; alw.

Mr. Morgan: We next offer in evidence Plaintiff's Exhibit No. 3, which purports to be a copy of a permit issued by the Railroad Commission of Texas, to the Plaintiff in this case to operate as a contract carrier, and this is attached to Plaintiff's Petition, and marked Exhibit No. 3.

Mr. McKnight: The same objections to this exhibit No. 3, which were made to Plaintiff's Exhibit No. 2.

The Court: Yes. I overrule the objection.

Mr. McKnight: We except.

PLAINTIFF'S EXHIBIT No. 3

Application No. 9705

Contract Carrier Permit No. 11449

Docket No. 9705

Contract Carrier Permit

Railroad Commission of Texas Motor Transportation Division

[fol. 131] Austin, Texas, July 9, 1941.

Leo H. Steele, DBA, Steele Distributing Company Wichita Falls, Texas, having complied with all the requirements of Chapter 277, Acts of the Regular Session of the Forty-Second Legislature, 1931, applicable to Contract Carrier Motor Carriers and having declared an intention not to operate as a Common Carrier Motor Carrier is entitled to and is hereby granted a permit to operate as a Contract Carrier within the State of Texas and within the territory as follows:

To transport goods, wares and merchandise, including Flour, Feed and Other Mill and Grain Products, for General Mills Inc., from their mill located at Wichita Falls, Texas, to points and places within a radius of 150 miles thereof; and from its mill located at Amarillo, Texas, to points and places within a radius of 150 miles thereof, and from such points and places within the radius described, to the mill located within the radius, but the transportation of the above commodities is prohibited over the following restricted highways:

U. S. Highway 80 from Mineral Wells to Texarkana via Fort Worth and Dallas;

U. S. Highway No. 77 from Gainesville to Hillboro via Denton and Dallas;

U. S. Highway No. 75 from Oklahoma Line to Galveston via Dallas, Corsicana and Huntsville.

This Permit is to be limited strictly to the transportation of the above described property, from and to the points and radius set out, above, for the firm named only, and to be transported only when sold F. O. B. the purchaser's premises.

[fol. 132] All Equipment to be operated under authority of this permit is to be restricted exclusively to that owned by the holder of such permit and shall not exceed Twelve Trucks.

This permit to remain in effect from and after the date hereof, subject to the provisions of Chapter 277 Acts Regular Session of the Forty-Second Legislature, 1931; the further orders of the Commission; and the rules and regulations of the Railroad Commission of Texas, heretofore prescribed or which may be hereafter prescribed under and pursuant to the authority conferred upon it by law.

Railroad Commission of Texas. (Signed) Ernest O. Thompson, Chairman. (Signed) Jerry Sadler. (Signed) Olin Culberson, Commissioners.

(Signed) C. F. Petet, Secretary. (Seal)

HS: alw,

0-101-939-1m in dup.

Mr. Morgan: We next offer in evidence, Plaintiff's Exhibit No. 4, attached to Plaintiff's first amended bill of complaint, which is General Order No. 25, of the Railroad Commission.

Mr. McKnight: We object to this order for the same reasons given as objections to the last two preceding documents, that is, for all of the various reasons set out.

[fol. 133] The Court: It will be overruled.

Mr. McKnight: We except.

Mr. Morgan: As I stated, this is a General Order issued by the Railroad Commission and dated August 22, 1931, and is as follows:

PLAINTIFF'S EXHIBIT NO. 4

State of Texas

Railroad Commission of Texas

Austin

Commissioners: C. V. Terrell, Chairman, Lon A. Smith, Pat M. Neff, C. F. Petet, Secretary

General Order No. 25

Austin, Texas, August 22, 1931.

Whereas, Chapter 314, of the Geenral Laws of the State of Texas, passed by the Forty-first Legislature, Re-

gular Session, as amended by Chapter 24, of the General Laws of the Second Called Session thereof, having been further amended by Chapter 277 of the Acts of the Forty-second Legislature Regular Session, by declaring all persons, firms, co-partnerships, corporations, companies, associations and joint stock associations other than common carriers, engaged in the transportation of property for compensation or hire over the highways of Texas, to be Contract Motor Carriers.

[fol. 134] And Whereas, said above mentioned acts imposed upon the Railroad Commission of Texas, the duty to fix, prescribe or approve rates and charges of such Contract Motor Carriers, as well as to fix prescribe or approve just and reasonable rules and regulations to be observed by such Contract Motor Carriers.

It is, therefore, ordered by the Railroad Commission of Texas, that, effective August 22, 1931, all Contract Motor Carriers as hereinbefore defined are and they are hereby ordered to observe and [illegible] them temporarily and until further orders of the Commission, pursuant to hearing called for Monday, August 31, 1931, under Motor Freight Circular No. 1297, the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Class "A" Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended; Railroad Commission of Texas Motor Freight General Rules Circular No. 1, as amended; and Railroad Commission of Texas Commodity Tariff No. 2, (Cotton and Cotton Linters), as amended.

Penalties

"If any motor carrier, or any officer, agent, clerk, servant or employee or receiver, or his agents, servants, or employee, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said commission, such contract carrier or any officer, clerk, servant or employee or receiver, his agents, servants or employee,

[fol. 135] of such contract carrier shall be guilty of misdemeanor and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions hereof, shall likewise be guilty of a misdemeanor and, upon conviction shall be punished by a fine of not more than two hundred dollars ($200.00) for each offense."

(Section 16 (i) New Motor Carrier Law.)

Railroad Commission of Texas, C. V. Terrell, Chairman. Lon A. Smith, Commissioner.

Attest:

C. R. McNamee, Acting Secretary. (Seal.)

Mr. Morgan: This is the order on which the Plaintiff bases his case, that the Railroad Commission has fixed a rate.

Mr. McKnight: We object to him arguing the case.

The Court: No comments on it.

Mr, Morgan: All right. We offer next, Plaintiff's Exhibit No. 5, which is Section No. 3 General Application of Rates. [fol. 136] Mr. McKnight: We make the same objection to the Plaintiff's Exhibit No. 5, as we did to the last three preceding exhibits.

The Court: The same ruling.

Mr. McKnight: We except.

Mr. Morgan: This is an order of the Railroad Commission, "Motor Freight Class and Commodity Tariff No. 1-A, Effective 7-26-40." And is as follows:

PLAINTIFF'S EXHIBIT NO. 5

Motor Freight Class and Commodity Tariff No. 1-A Effective 7-26-40

Seventh Revised Page 15 (Cancels 16th Revised Page 15)

Section No. 3

General Application of Rates

Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed:

(A) By Common Carrier Motor Carriers on Texas Interstate Traffic. (See Exception.)

Exception: The rates, ratings rules and regulations provided herein will not apply between Beaumont and Port Arthur on Traffic transported by F. N. Ragsdale for the account of Railway Express Agency, Incorporated.

[fol. 137] (B) By contract motor carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary.

(Cir. 1001, General Order 25 and Cirs. 1514, 2073 and 2198.)

Mr. Morgan: Now, if your Honor please, the next document here which we are going to have identified as Plaintiff's Exhibit No. 6, is on yellow paper and is attached to the petition, and I will not take the time to read this. I am offering it for the consideration of the jury and will nearly as I can state the headings in order to identify it without attempting to read it, if that is agreeable to the Court.

This is a schedule, if your Honor please, that we have prepared, and which Counsel agrees to be substantially correct, and there is no disagreement, as I understand between counsel as concerns the exhibit.

Mr. McKnight: Not on the computation. We deny that the tariffs upon which he bases the suit are shown in there, but we do not know anything about that, and we object to the exhibit for the reason that is a legal question.

The Court: I overrule the objection.

Mr. McKnight: If the Court please, so far as this long document is concerned, it just occurs to me that we are going to encumber this record something terrible, and since in view of the admissions that have been made, it does not seem to me like it would be necessary for us to formally offer this great big document with all of these different [fol. 138] sheets in it. I am not making any complaint about it other than it seems like we could eliminate that by what we have said in the admission.

Mr. Morgan: I think we can do that, but for the purpose of the record I would like to identify this in the record.

The Court: It will be admitted.

Mr. Morgan: We will not offer it all but have it identified.

Mr. McKnight: You can use it for any purpose you want to.

(Said Exhibit Six above referred to will be sent in its original form to the Circuit Court by order of the Trial Court.)

Mr. Morgan: As suggested by counsel just now, the Plaintiff made demands on Defendant for certain admissions, and at this time we should like to offer and read to the jury, the Plaintiff's demands for admission and the Defendant's reply.

Mr. McKnight: Let it be understood that we have the same objection to those as to the instrument offered.

The Court: All right.

Mr. Morgan: For the purpose of identification, these have been marked, the demands have been marked Plaintiff's Exhibit 7, and the replies of the Defendant have been marked Defendant's Exhibit No. 8, and this document is [fol. 139] headed: Plaintiff's Demand for Admissions and addressed to General Mills, Inc., Defendant, and Miley Hoffman, Williams, France & Johnson and R. M. Williams, 1039 First National Building, Oklahoma City, Oklahoma and Cantey, Hanger, McMahon, McKnight & Johnson and Alfred M. McKnight, Sinclair Building, Fort Worth, Texas; Attorneys for defendant.

Plaintiff Leo H. Steele, requests defendant General Mills, Inc., to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissions which may be interposed at the trial.

(The demands are numbered 1-2-3-4 et cet-ra and are put in the form of questions and the answers to the demands are likewise numbered 1-2-3 et cet-ra, in the form of answers, and said demands and answers thereto are as follows:

PLAINTIFF'S EXHIBITS 7 & 8

1. General Mills, Inc. is a foreign corporation but does have a corporate permit to do business within the State of Texas.

Answer to No. 1: General Mills, Inc., is a corporation duly and legally incorporated under the laws of the State of Delaware, with a permit to do business within the State of Texas.

2. General Mills, Inc. does do business within the State of Texas and within the jurisdiction of the United States District Court for the Northern District or Texas.

[fol. 140] Answer to No. 2: General Mills, Inc., does do business within the State of Texas, and within the jurisdiction of the United States District Court for the Northern District of Texas.

3. General Mills, Inc. operates a large mill at Wichita Falls, Wichita County, Texas (and also at Amarillo, Potter County, Texas) producing flour, feed and other products.

Answer to No. 3: General Mills, Inc. operates a mill at Wichita Falls, Wichita County, Texas, and also at Amarillo, Potter County, Texas, producing flour, feed and other products. The term "large mill' as used in Request No. 2, for admissions is a relative term and defendant is unwilling to admit that such mill at Wichita Falls is a large mill.

4. General Mills, Inc. purchases wheat and other grains within the State of Texas and transports or causes to be transported said wheat and other grains to Wichita Falls, Texas.

Answer to No. 4: General Mills, Inc. purchases wheat and other grains within the State of Texas and transports, or causes to be transported, said wheat and other grains to Wichita Falls. Likewise purchases of wheat and other grains are made from without the State of Texas and General Mills, Inc. transports or causes to be transported such grains to Wichita Falls, Texas.

5. General Mills, Inc. processes wheat and other grains at its mill at Wichita Falls, Texas and distributes the processed product in Texas.

Answer to No. 5: General Mills, Inc. processes wheat and other grains at its Wichita Falls mill and distributes the processed products in Texas and in other states.

[fol. 141] 6. The principal products of the mill at Wichita Falls, Texas are flour and feed.

Answer to No. 6: The principal products of the mill at Wichita Falls, Texas, are flour and feed.

7. General Mills, Inc. uses in its mill at Wichita Falls bags and paper containers, among other things, which are transported from points in Texas to Wichita Falls, Texas.

Answer to No. 7: General Mills Inc. uses in its mill at Wichita Falls bags and other containers, among other things which are transported from points in Texas and without Texas to Wichita Falls.

8. In General Mills, Inc. distribution of flour and feed it frequently happens that some of its products are returned from some of its customers wherever they may be located in Texas to Wichita Falls, Texas.

Answer to No. 8: In the distribution of flour and feed by General Mills, Inc., it frequently happens that some of its products are returned from some of its customers, wherever they may be located in Texas or elsewhere, to Wichita Falls, Texas.

9. The foregoing facts were true throughout the period August 1, 1941, to November 1, 1943.

Answer to No. 9: The foregoing facts were true at intervals during the period from August 1, 1941 to November 1, 1943, though defendant is unable to admit that such facts were continuous day by day throughout such period.

10. Leo H. Steele is a resident of Wichita Falls, Texas.

Answer to No. 10: Leo H. Steele is a resident of Wichita Falls, Texas.

[fol. 142] 11. During the period August 1, 1941, to November 1, 1943 Leo H. Steele was a contract carrier motor carrier operating under the provisions of Article 911b, Vernons Civil Statutes of Texas, Acts 1931, 42nd Legislature, page 480, Ch. 277 with amendments thereto and subject to the jurisdiction of the Railroad Commission of Texas.

Answer to No. 11: During the period from August 1, 1941, to November 1, 1943, Leo H. Steele was a contract motor carrier operating under the provisions of Article 911b, Vernon Sayles Civil Statutes, Acts 1931, 42nd Legislature, Chapter 277, with amendments thereto, subject to limited jurisdiction of the Railroad Commission of Texas as hereinafter stated. He was only permitted as provided for in said permit, to haul for General Mills, Inc. was not in

competition with any common carrier and the character of service so performed by him was not substantially the same as any service performed by common carriers. Therefore under Article 911b of said Civil Statutes, and particularly under Section 6aa thereof, the Railroad Commission of Texas did not have jurisdiction over the rates, fares and charges collected by the said Leo H. Steele from General Mills, Inc. and was without power to fix minimum rates, fares and charges to be so collected by said plaintiff from said defendant.

12. Throughout all the period August 1, 1941, to November 1, 1943, Leo H. Steele was the owner of and operated a Motor Carrier Service as a contract carrier by virtue of Contract Carrier Permit No. 11449, issued to the said Steele by the Railroad Commission of Texas pursuant to the applicable provisions of Acts 1931, 42nd Legislature, page 480, Chapter 277, and amendments thereto.

Answer to 12: Throughout all of the period from August 1, 1941, to November 1, 1943, Leo H. Steele was the owner of and operated a motor carrier service as a con- [fol. 143] tract carrier by virtue of Contract Carrier Permit No. 11449, issued to said Steele by the Railroad Commission of Texas pursuant to the applicable provisions of the Acts of 1931, 42nd Legislature, page 480, Chapter 277, and amendments thereto, subject, however to the limitations specified in the answers to Request No. 11.

13. Following the filing of the application of Leo H. Steele for the contract carrier permit, now identified as Contract Carrier Permit No. 11449, the Railroad Commission held a public hearing and Mr. McCraney, Traffic Manager for General Mills, Inc., at its Oklahoma City, Oklahoma office, appeared as a witness before the Railroad Commission and testified on behalf of Leo H. Steele.

Answer to No. 13: Following the filing of the application of Leo H. Steele for the contract carrier permit now identified as Contract Carrier Permit No. 11449, the Railroad Commission held a public hearing and Mr. McCraney, Traffic Manager for General Mills, Inc. at its Oklahoma City, Oklahoma, office, appeared as a witness before the Railroad Commission (appearing individually and not as an officer, agent or employee of General Mills, Inc.). The said McCraney appeared as any other witness at said

hearing and defendant is unable to state that he appeared on behalf of said Leo H. Steele although he was called as a witness by the attorneys for the said Steele.

14. The contract between Steele and General Mills, Inc. attached to complainant's first original amended bill of complaint as Exhibit "A" was a part of the application of Leo H. Steele for contract carrier permit (since issued by the Railroad Commission and identified as Contract Carrier Permit No. 11449) and in connection with and in support of which Mr. McCraney appeared before the Railroad Commission as a witness and testified.

[fol. 144] Answer to No. 14: The contract, Exhibit A, referred to in the demand, was not a part of the application for the said Leo H. Steele and was not in fact executed until long after the application was filed and the hearing held in which Mr. McCraney testified.

15. Exhibit "B" attached to complainant's first original amended bill of complaint is a true copy of the order of the Railroad Commission authorizing issuance of Contract Carrier Permit No. 11449.

Answer to 15: Exhibit B attached to the plaintiff's first original amended bill of complaint is a true copy of said order of the Railroad Commission of Texas authorizing Permit No. 11449.

16. Exhibit "C" attached to complainant's first original amended bill of complaint is a true copy of contract carrier permit No. 11449.

Answer to No. 16: Exhibit C attached to plaintiff's first original amended bill of complaint is a true copy of Contract Carrier Permit No. 11449.

17. The Leo H. Steele Contract Carrier Permit No. 11449 was in full force and effect throughout the period August 1, 1941 to November 1, 1943.

Answer to No. 17: The Leo H. Steele Contract Carrier Permit No. 11449, was in full force and effect throughout the period from August 1, 1941, to November 1, 1943.

18. At all times during the period August 1, 1941, to November 1, 1943, the Railroad Commission of Texas, acting pursuant to Section 6aa of Art. 911b Vernons Annotated

Civil Statutes of Texas 1925 (Sec. 6 of Acts 1931, 42nd [fol. 145] Legislature, page 480, Chapter 277) had prescribed minimum rates and charges to be collected by contact carriers.

Answer to 18: At all times during the period from August 1, 1941, to November 1, 1943, the said Railroad Commission of Texas, acting pursuant to Section 6aa of Article 911b, Vernon Sayles Civil Statutes of Texas of 1925 (Section 6 of Acts of 1931, 42nd Legislature, Chapter 277, Page 480), had prescribed minimum rates and charges to be collected by contract carriers operating in competition with common carriers and performing substantially the same service as common carriers but such minimum rates and charges have no application to contract carriers who did not operate in competition with common carriers and who did not perform substantially the same service as common carriers and such minimum rates and charges had no application to the service performed by plaintiff for defendant under the contract and supplemental contract hereinbefore referred to. Should such minimum rates and charges be construed as applicable, then the act of the said Railroad Commission of Texas seeking to make such minimum rates and charges applicable to the particular transportation services performed by plaintiff for defendant were unauthorized by law and contrary to law and infringed upon the constitutional rights, both state and federal, of defendant and said acts were therefore void and of no effect.

19. Exhibit "D" attached to complainant's bill of complaint is a true and correct copy of general order No. 25. of the Railroad Commission of Texas.

Answer to No. 19: Exhibit D attached to complainant's bill of complaint the request for Admissions is a true and correct copy of General Order No. 25, of the Railroad [fol. 146] Commission of Texas, but has no application to transportation services involved in this suit and if so construed is illegal and void for the reasons stated in the preceding answer.

20. Throughout the period August 1, 1941, to November 1, 1943, rates prescribed by the Railroad Commission of Texas, as minimum for contract carriers were as set forth in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1A.

Answer to No. 20: Throughout the period August 1, 1941, to November 1, 1943, the rates prescribed by the Railroad Commission of Texas as a minimum for contract carriers were as set forth in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A, subject, however, to the facts set forth in the above two preceding replies to request for admissions.

21. Section No. 3, Item No. 470, of Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1A specifically provdes:

"Item No. 470. Rates, rules and regulations in this tariff, or as may be amended, shall be observed:

"B" By Contract motor carriers, as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provides to the contrary."

Answer to 21: Section 3, Item 470, of the Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A, specifically provides as set forth in Request No. 21, for admissions. However, defendant says that such tariff was not applicable to the transportation services performed by plaintiff for defendant for the reasons set [fol. 147] forth in the reply to Requests Nos. 18 and 19 for admissions, and furthermore, that if said tariff be construed as applicable it is and was arbitrary, illegal and void.

22. Exhibit "E" hereto attached is a true and correct copy of Item 470, taken from Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1A.

Answer to No. 22: Exhibit E, referred to in request No. 22 for admission, is a true and correct copy of Item 470 taken from the Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A. Defendant makes the same statement with respect thereto as made in connection with its reply to Request No. 21.

23. Mr. McCraney, General Mills, Inc. then Oklahoma City Traffic Manager, and now in the Traffic Department of General Mills, Inc. general offices at Minneapolis, Minn. was and is familiar with Item No. 470, of Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1A when he testified at the hearing before the Railroad Commission on the Leo H. Steele application for contract carrier permit No. 11449.

Answer to No. 23: Mr. McCraney is not now in the Traffic Department of General Mills, Inc. Defendant is without information with respect to whether he was familiar with Item 470 of the Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A when he testified at the hearing before the Railroad Commission on the Leo H. Steele application for Contract Carrier Permit No. 11449, and because of such lack of information denies such fact.

[fol. 148] 24. In September, 1941, the Railroad Commission upon its own motion instituted an investigation of contract carrier rates under Railroad Commission Rate Docket No. 4280T and at the final hearings and argument before the Railroad Commission in the proceedings under that docket in January 1943 Mr. Frank Cross, General Mills, Inc., Oklahoma City Traffic Manager appeared before the Railroad Commission in support of the contention of contract carriers that the Rail oad Commission should make railroad car load rates applicable to contract carriers rather than the less-car-load rates prescribed for motor carriers in Class and Commodity Tariff No. 1A.

Mr. McKnight: I object to that, as being immaterial, irrelevant to any issue in this case, occurring long after the contract and other matters were entered into, and after the performance of the contract.

The Court: I'll hear you on that.

Mr. Morgan: If that is in line with defendant's contention and in answer to defendant's contention made in this lawsuit from its answers, motions and admissions, they are contending that these rates do not apply to them. Your Honor will remember Mr. Christopher's letter inserting this very item, this is the very item to which his letter referred and in which he expressed his opinion, and in pursuance to that very item the Court allowed Mr. Christopher's letter to go in. This thing here reaches the very heart of that propositon.

Mr. McKnight: We object to Mr. Morgan testifying in this matter, if he wants to testify let him be subject to [fol. 149] cross examination. So far as that question is concerned, it has no bearing on what he is talking about and we object to it because it is immaterial and irrelevant.

The Court: Unless it is referred to in that correspondence, I admit it, or rather permit it, Mr. McKnight, to read, I will sustain the objection.

Mr. Morgan: It is not referred to, but the same proposition is urged.

The Court: I sustain the objection.

Mr. Morgan: We except.

(The answer to 24 which was excluded by the Court, is as follows:)

"Mr. Frank Cross was present strictly as an observer at the final argument before the Railroad Commission of Texas in connection with the matter inquired about in Request No. 24 for admissions. Defendant denies the balance of the facts stated in request No. 24."

No. 25: As a general rule railroad carload rates are less than the less-car-load rates prescribed in Class and Commodity Tariff No. 1A.

Mr. McKnight: We object to that as bearing upon the same matter as the preceding question, and make the same objection.

The Court: I haven't heard the objection.

[fol. 150] Mr. McKnight: Well, it's immaterial and irrelevant.

Mr. Morgan: The answer is as follows:

"Defendant admits as a general rule that railroad carload rates are less than the less carload rates described in Motor Freight Class and Commodity Tariff No. 1-A which have no application to the transportation services performed by plaintiff for defendant and which, if made applicable, would be illegal and void for the reasons previously stated."

The Court: Well, that's a matter of regulation. Do you object to it?

Mr. McKnight: I object to it because it's immaterial.

The Court: I sustain the objection, it is unduly burdening the record.

Mr. Morgan: We next offer demand No. 26 as follows:

"Railroad Commission of Texas did enter an order in March 1943, Docket 4280T, Motor Freight Circular No. 2680, prescribing rail car load rates as minimum for contract carriers when freight is tendered to contract carriers in rail carload lots. Exhibit "G" attached hereto is a true copy of said order."

Mr. McKnight: We object to question 26.

[fol. 151] The Court: What is the purpose in wanting that?

Mr. Morgan: Our purpose in that is simply to show that the rate that the defendant is attempting to attack, in this case is simply a rate on carload lots or carload rate, and that the fixed contract which we contend to be illegal, that they are basing or attempting to base their rates on similar rates to those of carload rates as distinguished from the rates prescribed by the Railroad Commission.

Mr. McKnight: In the first place, that is not true. This contract upon which we say was the contract between the parties, does not say a thing in the world about carload rates; it says we are to pay Mr. Steele as compensation his costs plus certain other items, plus ten per cent, it does not say anything about carload rates.

Mr. Christopher: Our purpose of this is to show that General Mills had a Traffic Manager at that time who knew the Railroad Commission's prescribed rates, and that they were not paying rates to Mr. Steele on that basis and that they were known to them, and this is in response to their plea of estoppel.

Mr. McKnight: We object to Mr. Christopher making that statement.

Mr. Christopher: The Court asked the question and I am entitled to answer the question.

The Court: At this time, I do not think they are admissible, they might become admissible.

[fol. 152] Mr. Morgan: All right, note an exception.

(Answer to 26, which was excluded on objection of the Defendant, is as follows:)

"Defendant is informed that the order referred to in Request No. 26, was entered by the Railroad Commission of Texas but says that said order had no application to the transportation services performed by plaintiff for defendant and involved herein for the reason that such services so performed were not in competition with any services performed by common carriers and were not substantially the same as any services performed by common carriers and the Railroad Commission of Texas is and was without power or legal authority to fix or attempt to fix rates applicable to such service and if the order referred

to be construed as affecting such service it is illegal and void for the reasons previously stated."

Mr. Morgan: 27 is as follows:

On an appeal to the Courts by various railroads and motor carriers said order was held void and enforcement enjoined. A true copy of said judgment is attached as Exhibit "H."

Mr. McKnight: We make the same objection to that.

The Court: I sustain the objection to that.

(The answer to 27, which was excluded, is as follows:)

[fol. 153] "Defendant does admit that a true and correct copy of the judgment in the cause referred to is attached to the request for Admissions, marked Exhibit H. It is unwilling to construe the legal effect of such judgment, which speaks for itself. Neither plaintiff nor defendant was a party to the suit and neither is therefore bound in any sense by said judgment. Plaintiff's present counsel represented an intervener by the name of J. Tom Miller in said cause but in no sense appeared or had authority to appear for this defendant therein."

Mr. Morgan: We except.

28. After the judgment identified as Exhibit "H" the Railroad Commission entered a further order leaving in effect as applicable to contract carriers the rates theretofore prescribed in Class and Commodity Tariff No. 1A. A true copy of said further and final order under Docket No. 4280T is attached hereto marked Exhibit "I."

Mr. McKnight: We make the same objection to that, if the Court please. We have admitted that this was applicable in some previous answer, that this tariff 1-A was in effect during all of this period, and about the Commission changing it and then the Court changing the Commission's ruling and putting back the tariff, is entirely immaterial and creates a false issue in the case.

The Court: Read the answer to 28.

Mr. Christopher (Reading): Defendant admits that Exhibit "I" is a true copy of the final order entered by the Railroad Commission of Texas under Docket No. 2280-T, [fol. 154] and says that it was not a party to such proceed-

ings as aforesaid, that said order has no application to the transportation services performed by the plaintiff for defendant for the reasons aforesaid, and that if so construed is illegal and void for the reasons aforesaid.

The Court: All right, I will allow it to be read.

Mr. McKnight: We except.

29. Flour, meal, feed and paper bags move by motor carrier, common or contract, in less-car-load quantities, in Texas intrastate commerce, both under the Fourth Class and the Grocery Mixture rate; grain and bags, other than paper, and wheat move under the fourth class rate; and glassware moves under Column 60 rates.

Answer to No. 29. Defendant admits generally the facts requested in request No. 29 but says that the rates referred to therein have no application to the transportation of flour, meal, feed and paper bags, grain, bags other than paper and glassware by plaintiff for defendant for the reasons heretofore stated and any attempt to apply said rates thereto is and would be illegal and void for the reasons previously stated.

30. All shipments of flour, meal, and feed (or paper bags if any) which were shipped by General Mills, Inc., out of Wichita Falls on the trucks of Leo H. Steele would move, if the rate fixed by the Railroad Commission of Texas in Class and Commodity Tariff No. 1A was applied, under the grocery mixture rate, that rate usually being less than, although occasionally the same as, the fourth class rate.

[fol. 155] Answer to No. 30: Defendant admits generally the facts stated in request No. 30, but denies that the tariff or classification has any application to any merchandise transported by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, and was and would be illegal and void for the reasons stated.

31. All shipments of flour, meal and feed shipped into Wichita Falls by General Mills, Inc., on the trucks of Leo H. Steele, if five hundred pounds or more, would move, if the rate fixed by the Railroad Commission of Texas in Class and Commodity Tariff No. 1A was applied, under the

grocery mixture rate, but if less than five hundred pounds the shipment would move under the fourth class rate.

Answer to No. 31: Defendant admits generally the facts stated in request No. 31, but denies that the tariff or classifications has any application to any merchandise transported by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, was and would be illegal and void for the reasons stated.

32. All shipments of bags (other than paper which could move under the grocery mixture rate) when shipped into Wichita Falls on the trucks of Leo H. Steele would move, if the rate fixed by the Railroad Commission of Texas in Class and Commodity Tariff No. 1A was applied under the fourth class rate.

Answer to No. 32: Defendant admits generally the facts stated in Request No. 32, but denies that the tariff or classification has any application to any merchandise transported [fol. 156] by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, was and would be illegal and void for the reasons stated.

33. All shipments of glassware when shipped into Wichita Falls on the trucks of Leo H. Steele would move, if the rate fixed by the Railroad Commission of Texas in Class and Commodity Tariff No. 1A was applied, under the column 60 rate.

Answer to No. 33: Defendant admits generally the facts stated in Request No. 33, but denies that the tariff or classification has any application to any merchandise transported by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, was and would be illegal and void for the reasons stated.

34. Fourth class and column 60 rates refers to a classification of commodities for rate making purposes and as used herein and also as used in Railroad Commission of Texas Class and Commodity Tariff No. 1A refers to such classification as is found in National Motor Freight Classification-West; and supplements thereto, or reissues thereof.

Answer to No. 34: Defendant admits generally the facts stated in request No. 34, but denies that the tariff or classification has any application to any merchandise transported by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, was and would be illegal and void for the reasons stated.

[fol. 157] 35. Railroad Commission of Texas Class and Commodity Tariff No. 1A is governed, except as otherwise provided therein, by National Motor Freight Classification-West, and supplement thereto, or reissues thereof.

Answer to No. 35: Defendant admits generally the facts stated in request No. 35, but denies that the tariff or classification has any application to any merchandise transported by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, was and would be illegal and void for the reasons stated.

36. Railroad Commission of Texas Motor Freight Class and commodity tariff No. 1A fixes and prescribes rates applicable to commodities classified as fourth class and as Column 60, which are customarily called fourth class rates and column 60 rates, respectively.

Answer to No. 36: Defendant admits generally the facts stated in Request No. 36, but denies that the tariff or classification has any application to any merchandise transported by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, was and would be illegal and void for the reasons stated.

37. Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1A fixes and prescribes the "Grocery mixture" rate and is governed by Item No. 875 of said tariff.

Answer to No. 37: Defendant admits generally the facts stated in Request No. 37, but denies that the tariff or classification has any application to any merchandise transported [fol. 158] by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such tariffs and classifications is, was and would be illegal and void for the reasons stated.

38. The fourth class rate, any quantity, less-car-load; the grocery mixture rate, 500 pound minimum; and the column 60 rate, any quantity, less-car-load, (if a shipment moved between the points requiring the showing of such rates); each expressed in cents per hundred pounds between Wichita Falls, Texas and the other Texas points named, or vice versa, are truly set out in "Exhibit J" hereto attached as a part hereof.

Mr. Morgan: It is not necessary to read Exhibit J.

Mr. McKnight: We waive the reading of Exhibit J.

Mr. Morgan: We will stipulate that it may be waived and just considered . . reflecting what it shows.

Mr. McKnight: It can be considered as read without the necessity of reading it.

Mr. Christopher: I will read this answer to 38 as follows:

"Defendant admits generally the facts stated in Request No. 38, but denies that the tariff or classification has any application to any merchandise transported by plaintiff for defendant for the reasons previously stated and any act of the Railroad Commission of Texas attempting to apply such [fol. 159] tariffs and classifications is, was and would be illegal and void for the reasons stated." (Waiving the schedule referred to.)

39. All original documents, such as the original invoices showing yourselves as consignor and the names and points of destination of consignees, commodity et cetera, are in the possession of General Mills, Inc.

Answer to No. 39: Defendant admits the facts stated in Request No. 39, but says plaintiff is in possession of duplicate invoices.

40. Exhibit "F" attached hereto as a part hereof is a true and correct statement of all shipments made by you on the trucks of Leo H. Steele, including invoice number, date of shipment, commodity, origin, destination, weight, applicable rate under rates prescribed and fixed by the Railroad Commission of Texas in its Motor Freight Class and Commodity Tariff No. 1A, total charges for such shipments, entire total charges by month when said rates as fixed and prescribed by the Railroad Commission of Texas are applied, total amount of Federal Transportation Tax by months after the same became applicable, total amounts

paid by you to Leo H. Steele for transportation as a contract carrier motor carrier for such corresponding month, and the total amount by such months of the difference between the charges when the rates fixed by the Railroad Commission are applied to the shipments and the amount which you paid. You are requested to affirm or deny each individual entry of this exhibit, and any individual entry not denied will be assumed to be admitted. (Exhibit referred to is Plaintiff's Exhibit No. 6, transmitted to the Circuit Court of Appeals in original form.)

[fol. 160] Answer to No. 40: Defendant admits as substantially true the facts set forth in request No. 40, but says that the rates fixed and prescribed by the Railroad Commission of Texas in Motor Freight Class and Commodity Tariff No. 1-A attempted to be applied therein have no application to the transportation services performed by plaintiff or defendant for the reasons and all the reasons heretofore stated and if it was intended by the Railroad Commission of Texas to so apply such tariffs, then the act of the Railroad Commission, as well as the tariffs, to the extent so applied, were and are invalid and void for the reasons previously stated. All transportation services performed by plaintiff for defendant were performed under and by virtue of the original contract as amended by the supplement thereto and all charges as agreed to were paid by defendant to plaintiff and accepted by plaintiff in full settlement of all services so performed.

Mr. Morgan: That question does refer to this large exhibit which has been numbered by the reporter as Exhibit No. 6, and is in Plaintiff's Bill of Complaint, upon which Plaintiff goes to trial, and I believe counsel has stipulated——

Mr. McKnight (Interrupting): You can refer to it for any purpose you want to.

Mr. Christopher: It is referred to all along in this answer 40.

Mr. McKnight: Preserving our legal position, we wish to make the same objection to the introduction of the information shown on this exhibit as set forth in the answer itself as to why it is not binding on the plaintiff.

[fol. 161] The Court: All right.

Mr. Morgan: We are offering, of course, if your Honor please, if we have not already done so, these exhibits of

Plaintiff, Exhibit 7 and 8, there, which constitute the Plaintiff's demands for admission and the Defendant's reply thereto.

Mr. McKnight: We make the same objection.

(Plaintiff's Exhibit No. 7 is the document known as Demands for Admission, and Plaintiff's Exhibit No. 8, is the document known in the record as Answers to Plaintiff's Demands for Admission and both documents have heretofore been copied in this record beginning on Page 39.)

Exhibit G attached to Plaintiff's Demand for Admissions, which exhibit is as follows:

"Railroad Commission of Texas

Rate Division

Motor Freight Circular No. 2680

Amending Motor Freight Class and Commodity Tariff No. 1-A

Docket No. 4280-T. In re: Proposed order by the Railroad Commission Giving Contract Carriers Authority to Use and Charge Rail Carload Rates on Carload Quantities of Goods

[fol. 162] Austin, Texas, March 3, 1943.

The above numbered and entitled cause was docketed for public hearing by the Commission on its own motion, to receive evidence concerning and to consider the matter of prescribing rates to be observed as minimum by contract carrier motor carriers for the transportation of freight in carload quantities.

Public hearing has been held, briefs have been filed and oral argument has been had.

. . . . . .

Section 6aa of the Motor Carrier Law (Section 6aa of Article 911b Revised Civ Statutes of Texas) confers upon the Commission authorit , nd makes it its duty to prescribe minimum rates, fares and charges to be collected by contract carriers, subject to limitations therein provided. The said Section 6aa reads as follows:

"Sec. 6aa. The commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State *and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.*" (Italics supplied.)

Wherever the term "contract carriers" is used herein it is intended and should be understood to relate to contract carrier Motor carriers as covered by Section 6aa of the motor carrier law, above quoted.

When the Commission first undertook to prescribe minimum rates for the contract carriers under the provisions [fol. 163] of Section 6aa, supra, it was presented with the question of whether that part of the law reading:

"• • • which shall not be less than the rates prescribed for common carriers for substantially the same service."

related only to the rates of the common carriers over the highways, or whether it related also to the rates of the common carrier railroads and/or the rates of the Railway Express Agency, i.e. whether the Commission must consider only the rates of the common carriers over the highways, or must also consider the rates of the common carrier railroads and/or rates of the Railway Express Agency.

This question was then presented by the Commission to the Attorney General of the State of Texas, and the Attorney General issued an opinion to the effect that in fixing minimum rates for the contract carriers under Section 6aa, supra, the Commission must consider the services of all common carriers, and that the minimum rates fixed by the Commission for contract carriers may not be lower than the rates prescribed for the common carrier service most substantially similar—and, if the rates of the different classes of common carriers are different, the most substantially similar service will control the contract carrier rate.

At that time the net load which could be transported in one truck over the highways of Texas was limited by law to loads not exceeding 7000 pounds, and the rates of

common carrier motor carriers were less-than-truck-load rates, which rates in practically all if not all cases were the same as the railroad less-than-carload rates. Under conditions then existing the Commission concluded that the services of the common carrier motor carriers were most substantially similar to the services of the contract [fol. 164] carriers, and entered an order fixing the rates of the common carrier motor carriers as the rates to be observed, as minimum rates, by the contract carriers. In accordance with such order, the Commission's Motor Freight Class and Commodity Tariff No. 1-A now provides that the rates therein published for the common carrier motor carriers shall be the rates to be observed and applied as minimum rates by the contract carriers, with certain exceptions as provided in the tariff.

Subsequently, when permits were issued to contract carriers to transport liquid petroleum and petroleum products, in tank trucks, the Commission considered that the service of such contract carriers of liquid petroleum and petroleum products, in tank trucks, was not substantially the same as that of the common carrier motor carriers, and by appropriate orders provided that for the transportation of liquid petroleum and petroleum products, in tank trucks, contract carriers thereof shall observe and apply, as minimum, the railroad carload rates on the same commodities when shipped by railroad in tank cars. Common carrier motor carriers were not engaged in the handling of liquid petroleum and petroleum products, in bulk, in tank trucks.

* * * * * * *

The Texas law has since been changed to permit motor carriers to operate under an overall weight limit of 38,000 pounds. This new weight law was in effect at the time of our hearing in this cause and is in effect at this time. Under the present law motor carriers may haul loads of many commodities equal to carload minimum weights governing railroad carload shipments.

Where railroad carload rates are provided, the same are lower than the less-than-carload rates, which latter [fol. 165] apply on smaller lot shipments, and less-than-carload freight is handled through the freight depots.

The present rates of the common carrier motor carriers are, with a few exceptions, the same as the railroad

less-than-carload rates, the business of the common carrier motor carriers generally consisting of less-than-truckload shipments which are similar to railroad less-than-carload shipments.

* * * * * * *

Prescription of the railroad carload rates, as minimum rates for the contract carriers, on shipments tendered to and transported by the latter carriers *in carload quantities,* was opposed at the hearing by the common carrier railroads, the Common Carrier Motor Freight Ass'n. Inc., and by a few shippers or shipping interests. This opposition was based upon various contentions as to the Commission's authority under the law in fixing rates for contract carriers; and largely upon the contention that the service of the contract carriers is most substantially similar to that of the common carrier motor carriers and railroad less-than-carload service, and that it is the less-than-truck load rates of the common carrier motor carriers or the less-than-carload rates of the railroads that must be fixed as the minimum rates of the contract carriers. The shippers who appeared in opp[illegible] do not use the service of contract carriers, and f[illegible]at other shippers who do utilize the contract carrier service would have an advantage if the contract carriers are allowed to apply the railroad carload rates. It may here be observed, however, that the opposing shippers would have available the railroad carload service, at identically the same rates.

Prescription by the Commission of the railroad carload rates, as minimum rates for contract carriers, on freight [fol. 166] handled by such contract carriers in carload quantities, was supported at the hearing by certain of the contract carriers, and by certain shippers. These supporting shippers generally use contract carrier service, or have contracts under which they may use such service. It is the position of these supporting contract carriers and shippers, generally, that the railroad carload service is most substantially similar to the service of the contract carriers, i.e., in the case of shipments tendered in carload quantities.

* * * * * * *

The ruling heretofore made to the Commission by the Attorney General of the State of Texas, to the effect that minimum rates for the contract carriers must be con-

trolled by the rates of the common carrier whose service is most substantially similar to that of the contract carriers, we think is a correct interpretation of the law. Accordingly, it is our opinion that we must here determine whether the service of the railroads in the handling of carload freight, or the service of the common carrier motor carriers who engage principally in the handling of freight in less-than-truck-load (less-than-carload) quantities, is most substantially the same as that of the contract carriers on shipments of freight tendered to and handled by such contract carriers *in carload quantities.* Determination of this, determines the rate which may be fixed as minimum rates for contract carriers on this class of traffic.

It is our opinion that in the handling of less-than-truck-load shipments of freight the service of the common carrier motor carriers is substantially the same as the service of the contract carrier, and we adhere to the former conclusion of the Commission that as to this class of traffic the rates of the common carrier motor carriers shall [fol. 167] be the rates to be observed as minimum by the contract carriers. From the evidence here before us, however, and upon our consideration thereof, we are of the opinion and find that as to shipments tendered to the contract carriers in such carload quantities as the contract carriers may be in a position to handle, the carload railroad service on such traffic is most substantially similar to that of the contract carriers. Accordingly in our order to be appended hereto we will provide, as to shipments of freight which when handled by railroads, in carloads, are subject to minimum weights up to and including 30,000 pounds, and which are tendered to contract carriers in such carload quantities, the rates to be observed and applied as minimum rates by such contract carriers shall be the railroad carload rate, subject to the governing railroad carload minimum weight.

Order

Austin Texas, March 3, 1943.

Public hearing having been held in the above numbered and entitled cause, pursuant to notice duly given, and the evidence there offered having been considered, and having entered herein our opinion in writing setting forth our findings and conclusions, which said opinion is made part of this order, it is hereby ordered that Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A, be and same is hereby amended as follows:

1. By canceling Section (B) of Item No. 470, Section 3 of Tariff, and substituting therefor the following:

"(B)—By Contract Motor Carriers, as minimum, on Texas intrastate traffic. For the application of railroad carload rates, as minimum, for Contract Motor Carriers, See Items Nos. 1084 and 1084½, Section 8 of this tariff." [fol. 168] 2. By adding to Section 8 of Tariff, Item No. 1084½, as follows:

"Item No. 1084½—(a)—Railroad carload rates on shipments which when moving by railroad are subject to minimum weight of 30,000 pounds and less, shall apply, as minimum, for contract carriers on shipments of the same commodities when tendered to contract carriers in carload quantities the rates so applied to be subject to the railroad carload minimum weight.

(b)—Shipments subject to carload rates provided in this *time* must be tendered to the contract carrier at one origin, by one consignor, on one day, on one bill of lading and must be for delivery to one consignee at one destination and hauled in one truck at one time."

It is further ordered that our order and the tariff amendments above herein shall become effective March 25, 1943.

Railroad Commission of Texas, By Beaufford H. Jester, Chairman, Olin Culberson, Ernest O. Thompson, Commissioners.

Attest: L. D. Ransom, (Seal) Secretary.

"Railroad Commission of Texas
Rate Division

Motor Freight Circular No. 2681

Amending Motor Freight Circular No. 2680
and
Motor Freight Class & Commodity Tariff No. 1-A

[fol. 169] Docket No. 4280-T. In Re: Proposed order by the Railroad Commission giving Contract Carriers authority to use and charge Rail Carload Rates on Carload Quantities of goods.

Austin, Texas, March 4, 1943.

Further in the above numbered and entitled cause, it is ordered that Motor Freight Circular No. 2680, issued by the Railroad Commission of Texas on March 3, 1943, be and same is hereby amended by changing Item No. 1084½ of its Motor Freight Class and Commodity Tariff No. 1-A as therein established, to read as follows:

"Item No. 1084½. (a)—Railroad carload rates on shipments which when moving by railroad are subject to minimum weights of 30,000 pounds and less, shall apply, as minimum, for contract carriers on shipments of the same commodities when tendered to contract carriers in carload quantities, the rates so applies to be subject to the railroad carload minimum weight. See paragraph (b), and paragraphs (c), (d), (e) and (f) providing application of carload rates on shipments subject hereto.

(b)—Shipments subject to carload rates provided in this item must be tendered to the contract carrier at one origin, by one consignor, on one day, on one bill of lading, and must be for delivery to one consignee at one destination, and hauled in one truck at one time.

(c)—When moving between points served by railroad the carload railroad rate (mileage, or specific point to point, whichever is lower), shall be the rate to apply as minimum.

(d)—When moving between points, one of which (the origin or destination) is not served by railroad, the railroad carload mileage rate, based on the shortest combined [fol. 170] highway and rail distance between origin and destination which does not include any highway distance

between points served by railroad shall be the rate to apply as minimum.

(e)—When moving between points, neither of which (the origin or destination) is served by railroad, the railroad carload mileage rate, based on the shortest highway distance between origin and destination, shall be the rate to apply as minimum.

(f)—Highway mileage referred to in this item is that published on the current issue of the map issued by the State Highway Department. When point of origin and/or destination, or mileage thereto, are not shown on said map, the shortest highway mileage between such points and locations nearest thereto in direction of movement to and/or from which mileage is shown, will be determined by the individual carrier performing the service."

and, it is further ordered that Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A be and the same is hereby amended by adding thereto the above Item No. 1084½. Effective March 25, 1943, concurrently with Motor Freight Circular No. 2680.

Railroad Commission of Texas. By Beauford H. Jester, Chairman. Olin Culberson, Ernest O. Thompson, Commissioners.

Attest:

L. D. Ransom, Secretary." (Seal)

was excluded by the Court upon objection of the defendant.

[fol. 171] Exhibit H attached to Plaintiff's Demand for Admissions, which exhibit is as follows:

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 53RD JUDICIAL DISTRICT

No. 68338

COMMON CARRIER MOTOR FREIGHT ASSN. INC., ET AL

vs.

RAILROAD COMMISSION OF TEXAS

Consolidated

No. 68,339

BURLINGTON-ROCK ISLAND RAILROAD, ET AL

vs.

RAILROAD COMMISSION OF TEXAS

On August 25, 1943, came on to be heard the above entitled and numbered causes, which had heretofore by order of the Court been consolidated for trial, and the parties having announced ready for trial, and the Court on August 25-26-27, 1943, having proceeded to hear the pleadings, evidence, and argument of counsel;

And having considered the exceptions filed by the defendant, Railroad Commission of Texas, and the exceptions filed by the intervener, J. Tom Miller, to the petitions in each of the above styled and numbered causes, and having considered the written motions by the Attorney General and the intervener to strike evidence, it is the Court's opinion that such exceptions and motions should be overruled;

And the Court being of the opinion that the facts and the law are with the plaintiffs in both of such causes, is of the opinion that the law and the facts are with the plaintiffs, and that the orders of the Railroad Commission [fol. 172] of Texas herein complained of are unjust and unreasonable to the plaintiffs herein in each of said causes, and are null and void;

It is hereby on this —— day of August, 1943, ordered, adjudged, and decreed that the exceptions of the defendant, Railroad Commission of Texas, and of the intervener, J. Tom Miller, to the petition and motion to strike evidence

in each of such causes, be, and the same are hereby overruled, to which ruling of the Court in overruling such exceptions and motions the defendant, Railroad Commission of Texas, and intervener, J. Tom Miller, in open Court excepted and the intervener, J. Tom Miller, gave notice of intention to appeal but no notice of intention to appeal was given by the Attorney General;

It is further ordered, adjudged, and decreed that the orders of the Railroad Commission of Texas in its docket No. 4280-T of March 3-4, 1943, and March 18, 1943, herein complained of in each of said causes, be and the same are hereby canceled, vacated, and set aside; and that the defendant, Railroad Commission of Texas, be, and it is hereby restrained and enjoined from carrying or continuing such orders in effect and enforcing the same;

It is further ordered that costs of suit incurred by the intervener, J. Tom Miller, be taxed against said intervener, and that all other costs of suit be taxed against the Railroad Commission of Texas, for which let execution issue.

——— ———, Judge, 53rd Judicial District."

was excluded by the Court upon objection of the defendant.

[fol. 173] Exhibit I attached to Plaintiff's Demand for Admissions, which exhibits is as follows:

"Motor Freight Circular No. 2728

Amending Motor Freight Class and Commodity Tariff No. 1-A

Docket No. 4280-T. In Re: Proposed order by the Railroad Commission giving Contract Carriers authority to use and charge Rail Carload Rates on Carload Quantities of goods.

Austin, Texas, October 8, 1943.

The orders of the Railroad Commission of Texas issued pursuant to public hearing in the above numbered and entitled cause and as contained in Motor Freight Circulars Nos. 2680, 2681 and 2688 dated March 3, 1943, March 4, 1943 and March 18, 1943, respectively, having been voided by an order of the 53rd Judicial District Court of Travis County, Texas; and by the said Court order the Railroad Commission of Texas having been restrained and enjoined

from carrying or continuing its orders, supra, in effect and from enforcing the same:

It is ordered by the Railroad Commission of Texas that Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A, be and the same is hereby amended, as follows:

1. By canceling from Section (B) of Item ~~No. 470~~ of the said Tariff No. 1-A the reference to Item No. 1084½.

2. By canceling Item No. 1084½ of the said Tariff No. 1-A.

* * * * * * * *

[fol. 174] Nineteenth Revised Page No. 15, and First Revised Page No. 71AAA to the said Motor Freight Class and Commodity Tariff No. 1-A, giving effect to our order above herein, are being mailed to parties who appear on the Commissions mailing list for revised pages to the said Tariff No. 1-A.

Railroad Commission of Texas. By Olin Culberson, Ernest O. Thompson, Commissioners.

Attest:

L. D. Ransom, Secretary."

was excluded by the Court upon objection of the defendant:

Exhibit J attached to Plaintiff's Demand for Admissions is not here copied, because the information therein contained is sufficiently set forth in Plaintiff's Exhibit No. 6, transmitted to the Circuit Court of Appeals in its original form.

(The jury was retired from the Court room and the following proceedings were had:)

Motion of Defendant for Instructed Verdict

Mr. McKnight: Now comes the Defendant, the General Mills, Inc., at the conclusion of Plaintiff's Evidence, and after the Plaintiff has announced that he has rested, and [fol. 175] moves the Court to direct the jury to return a verdict at this time for the Defendant, under the rules made and provided for as such, without waiving its right to go forward with evidence if such motion is overruled, and for the grounds of such motion, shows as follows:

(1) That the burden of proof in this case rests upon the Plaintiff to establish, among other things, the fact that the Railroad Commission of Texas had the power under the laws of the State of Texas to provide rates and charges covering the operations involved in this case, and that such Commission did do so.

(2) The only power that has been delegated to the Commission to prescribe rates and charges for Contract Carriers operations mean that the power delegated under Section 688 Article 911b of the Statutes of Texas, Sayles Annotated Statutes.

That under the article referred to, the Railroad Commission is not empowered to fix rates covering operations of contract carriers unless such operations are in competi-on with common carriers, and unless the service performed by such contract carrier is substantially the same as the service performed by common carriers. That in the absence of the facts being shown, the power does not exist.

(3) In this particular instance the defendant says that the evidence in this case shows that Steele, the Plaintiff, made an application for a contract carrier's permit to operate or haul and transport goods, wares and merchandise for this defendant under a private arrangement. The Commission upon hearing this application entered an order which has been introduced in evidence by the Plaintiff as an Exhibit, under which the Commission undertook to find such facts, granting the contract carrier's permit [fol. 176] and contract carrier's permit was granted pursuant to such order.

(4) The Commission was without power, directly or indirectly, to fix or establish rates covering this particular transportation service without finding the existence of the jurisdiction as facts upon which that power might be used or applied or exercised. That is, in this particular instance the Railroad Commission of Texas not only failed to find the existence of the essential elements upon which that power is conditioned, but found as a matter of fact, both expressly and impliedly, that competition did not exist and that the service to be performed under the contract carrier permit was substantially the same as the service performed by common carriers. Therefore, if in fact the Railroad Commission did either directly or indirectly attempt to

apply the tariff rates which have been introduced in evidence in this case by the Plaintiff to this particular transportation service, the act of the Railroad Commission on its face shows to be void and without authority of law, and for that reason Plaintiff's basis for a cause of action failed.

(5) And as a further and additional ground for the motion, Defendant respectfully shows to the Court that in any event it is necessary that Plaintiff, in order to recover upon the alleged tariff of the Railroad Commission, must show as a matter of fact the existence of the existing facts justifying the exercise of power, that is to say, they must show by facts and the burden is upon the plaintiff to do so, that Plaintiff's operations were in fact in competition with the operations of the common carriers, and that the services performed by him was substantially the same as the services performed by a common carrier. There is no evidence in the record showing the existence of these two facts, and on the contrary, such evidence as is in the record, shows to the contrary, and the burden [fol. 177] of proof being upon him, in any event, upon these two issues, the defendant says that plaintiff has not made out a case and that the jury should be instructed to return a verdict in this case for the defendant.

MOTION OF PLAINTIFF FOR DIRECTED VERDICT

Mr. Morgan: In reply to defendant's motion for an instructed verdict, we too should like to ask the Court to instruct the jury to find a verdict for the plaintiff.

Mr. Christopher: We put our motion both ways. The Court still has before it our motion, and you can pass on that or on the motion Mr. Morgan made.

(Whereupon the motions referred to were argued during the remainder of the afternoon session on December 11, 1944 and into the morning session of December 12, 1944. At the conclusion of the argument the following proceedings were had:)

STATEMENT ON MOTIONS FOR DIRECTED VERDICT

The Court: I am ready to decide all the legal questions right now, and as originally, the motions made by the parties to instruct a verdict in their favor, but I am handicapped in doing that:

"A party who moves for a directed verdict at the close of the evidence offered by an opponent, may offer evidence in the event that the motion is not granted, without having reserved the right to do so, and to the same extent as if the motion had no been made. A motion for a directed verdict shall state the specific grounds therefor.

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not [fol. 178] granted, the Court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion.

"Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. * * * If a verdict was returned the Court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict has been directed."

Now, here, the defendant has reserved the right, which he did not have to do, or they do not have to do, whatever the action of the Court might be, on the motion, to introduce evidence. Now the plaintiff's position is that they are ready to have the question decided, which means that I let the case go on up on decision by the Appellate Court. But that is not the position of the defendant; if so, I am ready to announce my decision.

Mr. McKnight: If the Court please, I will try to make my position clear—I tried to make it clear in the arguments.

We think the burden is and has been on the Plaintiff to establish the issues of fact, and if the Court holds that the burden is not on the Plaintiff to prove those facts, but on the defendant to prove them, then we have got evidence that we want to offer, and that is the reason I made the reservation in the motion.

We have witnesses on that issue. I do not know what the Court's conclusions are, if he construed that the evidence is material or is not material, we have made the issues.

The Court: That is what I pointed out.

[fol. 179] Mr. McKnight: I will say this: I construe counsel's position in his argument to concede that that was

an issue that was immaterial, or state that it was immaterial and I think the Court should act on the motion that we will show what we allege is true, is material. I may be wrong about that. I construe the argument as being a statement to the Court that he did not join issue on those fact questions.

The Court: I seem not to be quite to the place where I can act yet. My idea is, and that was my idea in filing the opinion which I filed in April of this year, to bring this matter to trial, with the hope that the parties, each of them, would get in all of the evidence that they wanted to introduce and then I knew these identical questions, of course, would be here, and that I would be in better situation with all of the evidence in from each party that they wanted to introduce, and that the Court would admit, and then make rulings on the law questions and let the whole thing go up, rather than take the pleadings for the facts and what the parties say, and pass on it on that basis.

On July 12, of this year, it occurred to me, when I wrote that letter, that the defendant might have evidence to offer tending to show, or showing that the Commission had no authority to fix the rates. In other words, they might show that the Commission's act in doing so was void, and I felt that if they did have, they should be given their day in Court to show it, if they could, and that is all that letter in April meant. Still trying to get this case where I could finally decide these law questions. They are very interesting law questions and counsel for the parties have certainly ably presented their respective views about it.

It has been most helpful. Of course, after all, it is nothing but a law question that we have here, and I have [fol. 180] really been ready to decide it before, but feel that I am better prepared to decide it now than I have been heretofore, in the light of the arguments that have been advanced on this occasion.

But I have read the rule, and there is nothing I can do but go on, and I am going to take both motions under advisement. When I will pass on them, I do not know.

Mr. Morgan: Does that mean if the Defendant has no testimony today you will let him bring his testimony in?

The Court: Oh yes.

Mr. McKnight: I understand the Court is not overruling either of the motions at this time?

The Court: That is right.

Mr. McKnight: But it will be understood that our going forward and producing evidence at this time is not construed as a waiver of the motion that I made?

The Court: No, you are absolutely protected.

Mr. McKnight: I am going ahead at this time; the burden of proof, I don't think is on me, but I am doing it because after having made a motion to the Court——

The Court (Interrupting:) You are absolutely protected under the rules.

[fol. 181] Mr. McKnight: I think so too, but I wanted to say that.

The Court: Be prepared with your witnesses at 2:00 o'clock.

(The Court was adjourned until 2:00 o'clock P. M.)

Afternoon Session December 12, 1944

(The following proceedings were had in the presence of the jury.)

DEFENDANT'S TESTIMONY

L. B. COLFIX, being duly sworn, on behalf of the Defendant, and examined by Mr. McKnight, testified as follows:

Q. Your name is L. B. Colfix?

A. Yes, sir.

Q. Where do you live Mr. Colfix?

A. I live in Oklahoma City, Oklahoma.

Q. What is your business?

A. I am Division Comptroller for General Mills Inc.

Q. That is General Mills who is defendant in this lawsuit?

A. Yes.

Q. How long have you been connected with General Mills?

A. A little over 20 years.

Q. What are your duties as Division Comptroller?

A. I have the responsibility for the accounting, insurance, tax and administrative duties.

[fol. 182] Q. Are you acquainted with Mr. Leo H. Steele, the Plaintiff in this lawsuit?

A. Yes, sir.

Q. How long have you known Mr. Steele?

A. Since 1931 when I moved to Oklahoma City.

Q. What was Mr. Steele doing at that time?

A. At that time Mr. Steele was bookkeeper in the accounting department.

Q. For whom?

A. For me.

Q. You mean for General Mills, Inc.?

A. That's right.

Q. And worked under you?

A. Correct.

Q. How long did you and Mr. Steele together continue in the office of General Mills at Oklahoma City?

A. Until he left Oklahoma City in October, 1940.

Q. What was the occasion of his leaving Oklahoma City in October, 1940?

A. Slightly prior to that time, about January, 1940, we made a contract for outside handling of our merchandise and trucking. At that time Mr. Steele had supervision of the trucking when we were handling it ourselves.

Q. You say you made an outside contract at what place?

A. At Oklahoma City. After we made the contract and had this outside contract carrier there was no further need for Mr. Steele to supervise our Oklahoma City trucking activities, and he was transferred in October, 1940 to Wichita Falls preparatory to us making a contract with him for contract carrying in Wichita Falls, Texas, by him.

Q. He came to Wichita Falls in October, 1940?

A. Yes, sir.

Q. Now, between the time he came to Wichita Falls in October, 1940, and the time this contractual operation, [fol. 183] which is the subject of this suit, started, what did Mr. Steele do?

A. Mr. Steele was an employee of General Mills at Wichita Falls, supervising our truck operations at Wichita Falls.

Q. For the Company?

A. Yes, for the company.

Q. He was an employee during that period?

A. Yes, sir.

Q. You did make a contract with Mr. Steele for handling such truck operations?

A. That is correct.

Q. Prior to the time the operations started under this contract with Mr. Steele, what character of company operations was the company doing itself at Wichita Falls?

A. At Wichita Falls, we had a fleet of trucks and truck drivers, and an organization that had the responsibility of transporting our freight and servicing our customers in line with the transportation and delivery of our products.

Q. To what extent did your own trucking organization handle the delivery of the products before Mr. Steele's operation started?

A. The handling of our products was exactly the same as later when he handled it, they delivered merchandise and serviced customers within an approximate radius of 150 miles, to small retail merchants.

Q. This trucking operation of your own then included substantially the same radius as that by Mr. Steele after his operations begun?

A. Yes, sir.

Q. Outside of that radius generally, how was your merchandise transported?

A. Outside of the radius, all of our merchandise was transported by the Railroads.

Q. Was this arrangement with Mr. Steele—did this arrangement that you made with Mr. Steele affect that [fol. 184] class of transportation of your product that you had prior to the time you made the arrangement that had been shipped by rail?

A. No.

Q. That was not diverted to Mr. Steele's trucks?

A. No.

Q. Getting back a little bit to the inception of this transaction, did you at any time after Mr. Steele came to Wichita Falls, submit to him a form of contract or arrangement to cover the service you expected him to render?

A. Yes, is was submitted in the form of a proposed contract, and also at the time he left Oklahoma City and went to Wichita Falls, he was fairly familiar with the form of contract that we had at Oklahoma City.

Mr. Morgan: That is not responsive and is not material; furthermore an attempt to vary the terms of a written contract; the contract speaks for itself and the Court shall interpret it.

The Court: Just answer the question, Mr. Colfix. Repeat the question.

(Question read.)

A. Yes.

Q. Had you prior to that time discussed with him compensation to be paid to him for this kind of service?

A. Yes.

Q. This contract that you submitted to him, do you have a copy of that in your possession?

A. No, sir.

Mr. McKnight: Do you gentlemen have? That is the original draft. That was not signed, that draft of the contract was not signed as I understand it, Mr. Colfix?

[fol. 185] A. That is correct.

Q. Following the submission of that contract to Mr. Steele, did you then have some further negotiations with him and his attorneys with respect to the character of the contract to be entered into?

A. Yes, sir.

Q. I hand you here, a letter marked Defendant's Exhibit No. 1——

Mr. Morgan: (Interrupting.) I believe this is—I assume you are going to identify it.

Mr. McKnight: I will identify it before it is offered, I will give you a chance to make your objection before it is offered.

Mr. Morgan: All right.

Mr. McKnight:

Q. I hand you a letter which is marked Defendant's Exhibit No. 1, which purports to be a letter from Cecil A. Morgan to Leo H. Steele, and then a post script on the second page of the letter also signed by Cecil A. Morgan, and this letter is on the letterhead of Culbertson, Morgan, Christopher & Bailey, and I'll ask you if that letter was submitted by anyone and if so by whom?

A. This letter was delivered to me by Mr. Steele.

Q. About the date of the letter, would you say somewhere in that neighborhood?

A. Shortly after that.

Q. That bears date of February 28, 1941, about how long would you say after the date of that letter was it delivered to you by Mr. Steele?

A. I do not recall the date.

[fol. 186] Q. Approximately how long?

A. It was shortly after that.
Q. How much afterward?
A. Shortly after that.
Q. Shortly after that?
A. Yes.

Mr. McKnight: We now offer the letter, if the Court please.

Mr. Morgan: If your honor please, your Honor for the purpose of the record, we would like to make an objection now to all of this line of testimony for the following reasons, first, it is irrelevant to any issue in this case, and is immaterial. In the next place, this is a privilege communication between lawyers and clients; and in the next place this is an attempted collateral attack upon the rate order of the Railroad Commission of Texas, it is by indirection attempting to arrive at a collateral attack of the order.

In the third place they are attempting to vary the terms of a contract, the contract on which they base their application for a permit in this case.

In the next place the instrument offered in evidence is one expressing legal opinions and not questions of fact, and therefore is not material to the issues in this case.

The Court: Does that letter, and other letters you are going to offer in line with that correspondence, did it all terminate in a contract?

Mr. McKnight: Yes sir, it culminated in a contract and the purpose of that is—the purpose of that is to—it has a two fold purpose, but the particular purpose of it I think is important at this time, to show that the new contract, [fol. 187] both the original contract and the supplemental contract, were all a part of the same contraction instead of separate and distinct transactions and one is dependent upon the other. That is the purpose. That is one of the purposes and the main purpose I have in mind at this time in showing the background of the contract.

The Court: Do you call that correspondence a transaction?

Mr. McKnight: I call the correspondence a part of the entire transaction.

The Court: Leading up to——

Mr. McKnight. (Interrupting.) Leading up to the final execution of these contracts, and this correspondence ties the two contracts together in such a way as to make each of them a part and parcel of the other.

The Court: Does it make them understandable?

Mr. McKnight: No, sir, but it shows that one is dependent upon the other instead of being independent and separate transactions, and that the second, the second contract was in contemplation at the time the first contract was entered into.

The Court: I overrule the objection, I will pass on that later.

Mr. Morgan: Note our exception.

[fol. 188] Mr. McKnight: Gentlemen of the jury, we offer in evidence as Defendant's Exhibit No. 1, the letter which has been identified by the witness and dated February 28, 1941, addressed to Mr. Leo H. Steele, % General Mills, 1800 Burnett Street, Wichita Falls, Texas, reading as follows:

DEFENDANT'S EXHIBIT No. 1

Dear Mr. Steele:

Since you left this morning, I have again carefully considered the proposed contract to be entered into between you and General Mills.

Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

"It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission."

Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

Very truly yours,

(Sgd.) Cecil A. Morgan.

February 28, 1941.

Mr. Steele: P. S. A Custom has long prevailed in this state that contract carriers must carry such provision as outlined [fol. 189] in the letter to which this is attached relating to

rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

Very truly yours,
(Sgd.) Cecil A. Morgan.

Special delivery.

Mr. McKnight:

Q. Mr. Colfix, this letter refers to certain numbered paragraphs in the contract or form of contract which you had submitted to Mr. Steele, that is the one you referred to a while ago about having submitted to him in Oklahoma City?

A. That is correct.

Q. Now these paragraphs 13, 14 and 15 and 16 contained in that draft of the exhibit, to what did they refer —to what did they relate?

A. They related to the—

Q. You need not go into detail, just the, just the subject matter—

A. (Interrupting.) To the compensation to be paid by the General Mills to Mr. Steele for services performed under the contract.

Q. All right, now, just as a matter of clarifying one point at this time,—these paragraphs 13, 14, 15 and 16, as was contained in this original draft, were not contained and set forth in the contract that has been marked Plaintiff's Exhibit No. 1, are they?

A: No, sir.

Q. In lieu of them, there was placed or inserted in the contract, Plaintiff's Exhibit No. 1, what is now called paragraph 13, see if that is correct?

A. That is correct.

[fol. 190] Q. Otherwise contract Plaintiff's Exhibit No. 1, it is the same as the original draft of the contract submitted to Mr. Steele?

A. Yes, sir, that is correct.

Q. Right at this point, Mr. Colfix, let me ask you this question: Did you ever make an application for a permit

for General Mills to transport—to have Mr. Steele transport goods for you?

A. No, sir.

Q. Did you ever see the application that Mr. Steele himself filed?

A. No, sir.

Q. You did not join in that yourself?

A. No.

Q. I hand you defendant's Exhibit No. 2, and I will get you to state what that is, please sir?

A. This is my file copy of a letter addressed to Mr. Leo H. Steele, at Wichita Falls, dated March 27, 1941.

Q. Did you send the original of that letter to Mr. Steele?

A. Yes, sir.

Q. That was some month or so subsequent to the date of Mr. Morgan's letter?

A. That is correct.

Q. Had you had Mr. Morgan's letter at the time you wrote that letter to Mr. Steele?

A. Yes, this is in reply to that.

Mr. McKnight: We now offer in evidence Defendant's Exhibit No. 2.

Mr. Morgan: We make the further objection now to go to each of these instruments, to save time——

Mr. McKnight: (Interrupting.) I agree that all of the objections heretofore made——

[fol. 191] Mr. Morgan: (Interrupting.) I think it will be a little different. The other was a privilege communication. That is not true in this instance, and we make the objection that this is irrelevant and immaterial, and second, that this is an effort by putting in these extraneous matters to make a collateral attack on the rate order of the Railroad Commission of Texas.

And, third, that this is an effort on the part of the defendant to bolster up and support an illegal contract.

And fourth, that it is an effort to vary the terms of a written contract which speaks for itself, on which the Court alone may interpret and explain, and that this Court alone is the one, and that any effort on his part to explain it by other instrument is invading the province of the Court and the jury.

And for the further reason that they are in every instance expressions of legal opinions and are not facts that this Court or the jury may consider.

The Court: It may be that you are correct, but I am going to permit the evidence to go into the record.

Mr. Morgan: Note an exception.

The Court: I may consider it later.

Mr. McKnight: We have no objection to the same exception going to each of these letters, without making them each time.

Defendant's Exhibit No. 2 is the letter which has just been identified by the witness and is dated March 27, 1941, a letter to Leo H. Steele from L. B. Colfix and is as follows:

[fol. 192] DEFENDANT'S EXHIBIT NO. 2

March 27, 1941.

Mr. L. H. Steele, Wichita Falls.

Mr. L. B. Colfix, Oklahoma City.

You received a letter from your attorney, Mr. Morgan, in which he recommended certain changes in the contemplated contract to be entered into between you and General Mills. The principal change has to do with the method of compensation for trucking services, and it is recommended by Mr. Morgan that the compensation be specified in the contract as follows:

"It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission."

It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the rate specified by the Railroad Commission. McCraney had the idea that the Railroad Commission might not promulgate any rates. In that case we would have to have a charge not in conformity with the contract, which might cause difficulty.

I think before we can give further consideration to this form of contract we should know definitely what kind or rates, if any, have been established by the Railroad Commission. Is there any way you can find out what factors they use in determining their rates and to what extent [fol. 193] they may be expected to assign rates and when and if your permit is approved?

LBC/FH.

Mr. McKnight: (To the witness.)

Q. Who is Mr. McCraney, referred to in this letter?

A. At that time Mr. McCraney had the responsibility in our organization of directing all of the truck activity in the southwestern division of General Mills.

Q. He was an employee of General Mills?

A. Yes.

Q. Now, I hand you Defendant's Exhibit No. 3, which is a letter on the letter-head of Culbertson, Morgan, Christopher & Bailey, dated April 3, 1941, and addressed to Mr. L. B. Colfix, and signed by Mr. T. S. Christopher, did you receive that letter?

A. Yes, sir.

Mr. McKnight: We offer in evidence this letter as Defendant's Exhibit No. 3——

Mr. Morgan: For the same reasons, we object to it.

The Court: Yes.

Mr. McKnight: The letter is on the letter-head of Culbertson, Morgan, Christopher & Bailey, and dated April 3, 1941, and is as follows:

[fol. 194] DEFENDANT'S EXHIBIT No 3.

Dear Sir: Mr. Steele has referred to us for attention your interoffice correspondence with him under date of March 27th, relating to the suggestion by Mr. Morgan as to the paragraph in the contract to be used on the contract carrier application of Mr. Steele pending before the Railroad Commission. Mr. Morgan is out of the city for a few days and has requested that I advise you with reference to this matter.

I note your statement that it would appear that if you are to live up to the contract that the basis of rates would necessarily have to be known to you and that it was Mr. McCraney's idea that the Railroad Commission might not promulgate any rates.

For your information and the basis upon which Mr. Morgan's recommendation was made with reference to the paragraph pertaining to rates, the Texas law (Article 911b Vernon's Annotated Civil Statutes 1925) provides as follows:

"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

From the foregoing, you will see that the Statute itself fixes the rate to be charged by contract carriers as "not less than the rate prescribed for common carriers for substantially the same service."

[fol. 195] It is my understanding, and I am sure that it is true, that the Railroad Commission has heretofore prescribed minimum rates for contract carriers in line with the requirements of the quoted Statute. If I am not mistaken these rates were fixed in Railroad Commission tariff circular No. 2(a). At least it will not be much trouble to check the rates prescribed by the Railroad Commission and find the rates fixed for contract carriers, and unless it has been changed sometime recently it is contained in the circular mentioned.

I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or to yourself with reference to this matter the next time Mr. Steele is in the office.

Very truly yours,

(Sgd.) T. S. Christopher.

TSC/M: cc Mr. Leo Steele

Mr. McKnight: (To the witness.)

Q. I hand you now, Defendant's Exhibit No. 4, and ask you to state what that is?

A. That is my file copy of a letter addressed to Mr. L. H. Steele at Wichita Falls, dated April 5, 1941.

Q. You refer in that to a letter addressed to you by Mr. T. S. Christopher in Ft. Worth, is that the letter I just read to the jury?

A. That is correct.

Q. Did you send the original of this letter to Mr. Steele?

A. Yes, sir.

Mr. McKnight: Gentlemen of the jury, we now offer in evidence Plaintiff's Exhibit No. 4, which is the letter just referred to and identified by the witness.

[fol. 196] Mr. Morgan: We make the same objection.

Mr. McKnight: Defendant's Exhibit No. 4, is as follows:

DEFENDANT'S EXHIBIT NO. 4

April 5, 1941.

Mr. L. B. Colfix, Oklahoma City.

You have received copy of letter addressed to me by Mr. T. S. Christopher of your firm of attorneys, at Fort Worth; you will observe in the last paragraph of this letter, Mr. Christopher indicates he has some valuable suggestions to make to you and I.

Since there are a number of things in the letter which appear unsatisfactory to us, I believe we should investigate the matter further and I would appreciate very much if you would make an appointment for you and I to meet this gentleman in Fort Worth at some early date. Will you please let me know when it will be and I will meet you in his office in Fort Worth at that time.

LBC/FH

By Mr. McKnight:

Q. Mr. Colfix, had the contract which has been introduced in evidence as Plaintiff's Exhibit No. 1 been executed at the time you wrote this letter on April 5, 1941?

A. No, sir.

Q. Had you prior to that time referred this matter to your attorney in any respect?

A. Yes, sir.

[fol. 197] Q. Did you hear from Mr. Steele in response to this letter with respect to making an appointment to meet you in his attorney's office in Fort Worth?

A. Yes, sir, I did.
Q. Was that appointment made?
A. Yes, sir.
Q. Did you come to Ft. Worth for that purpose?
A. Yes, sir.
Q. Can you tell me the date of that conversation or that meeting that took place—before you answer that question, I hand you Defendant's Exhibit No. 5, and ask you if by checking that letter you can tell me the date that meeting took place?
A. We had that meeting the morning of April 11, 1941.
Q. Who was present at that meeting?
A. Mr. Steel, Mr. Morgan, Mr. Christopher and myself.
Q. Mr. Steele, Mr. Christopher and yourself?
A. Yes, sir.
Q. In Mr. Christopher's office I take it?
A. I do not recall whose office it was.
Q. Well, it was here in Ft. Worth?
A. Yes, sir.
Q. In an attorney's office here?
A. Yes.
Q. Did you meet Mr. Steele there or did you go with Mr. Steele to the office?
A. It is my recollection that I met Mr. Steele at the office there.
Q. Now, just state in your own language and as briefly as possible what was said and what took place at that meeting?
A. I indicated to these gentlemen that my first concern about the execution—

[fol. 198] Mr. Morgan: (Interrupting.) In addition to the objections heretofore urged, he is attempting in an oral statement to state what has been merged in a written contract, and therefore it is not admissible on any theory and we respectfully object to it.

Mr. McKnight: We are not seeking to vary the contract but merely to show the background of it and show our purpose in the entire transaction.

The Court: I overrule the objection.

Mr. Morgan: We except.

The Witness: I indicated to these gentlemen that the form of contract that they proposed to us was entirely dif-

ferent than the understanding that Mr. Steele and our company had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally execute a supplemental contract for the type of service that would be rendered by Steele for us.

I indicated to these gentlemen that our company had a great deal of confidence in Mr. Steele, and that we never [fol. 199] expected to have any difficulty with Mr. Steele in this type of contract, but I did wonder if there was any possibility that some later Court ruling or interpretation being made that the Railroad Rates could apply to the contract that we had, and they informed me again that the contract was a legal contract, that it was an agreement between two parties and that the Railroad rates for common carriers would not apply to our operation and that we would have nothing to worry about.

Mr. McKnight: You say the contract was a legal contract, to what contract do you refer?

A. I refer to the original contract as suggested by them, supported with a supplemental contract for charges. You see the original contract had not basis for charges under the theory that the Railroad rates did not apply, and we must have charges, between individuals.

Q. And that was what you expected to put in your supplemental contract, the agreement with respect to rates?

A. That is correct.

Q. That was to what your conversation was directed?

A. That's correct.

Q. Now, did you receive any letter from Mr. Christopher following that conversation in Forth Worth?

A. I received a confirming letter after our conversation.

Q. I hand you this letter, Defendant's Exhibit No. 5, and ask you if that is the letter you received from Mr. Christopher?

A. It is.

Mr. McKnight: We offer in evidence Defendant's Exhibit No. 5.

[fol. 200] Mr. Morgan: We make the same objection.

Mr. McKnight: This Exhibit No. 5, is a letter on the letter-head of Culbertson, Morgan, Christopher & Bailey, dated Ft. Worth, Texas, April 11, 1941, and addressed to Mr. L. B. Colfix c/o General Mills, Inc., Oklahoma City, Oklahoma, and reads as follows:

DEFENDANT'S EXHIBIT No. 5

DEAR SIR:

This is in reference to and confirms our conversation of this morning while you and Mr. Steele were in the office. It will also supplement our letter to you of April 3rd.

It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges as have been prescribed by the Railroad Commission of Texas, that being under the provisions of the statute of, as quoted to you in my letter of April 3rd, copy of which is also enclosed herewith.

In my letter to you of April 3rd, I ppinted out the fact that the Railroad Commission has attempted to prescribe rates for contract carriers, that being contained in Railroad Commission of Texas Tariff Circular No. 2-A, which fixes a minimum rate for contract carriers only, at the rate prescribed for common carriers.

You will especially observe the language of the statute which contains the following language:

"The Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which [fol. 201] shall not be less than the rates prescribed for common carriers for substantially the same service."

Of course, you have not had any experience with the service of contract carriers, but you do anticipate that the service to be rendered under the contract which you propose to make will not be a service which will be in any respect "substantially the same service" as is rendered by common carriers, for the simple reason that this contract carrier, if you enter into a contract and if the permit is approved, will devote all of its time and attention to you exclusively and to no other member of the general public.

The trucks which he operates will be dedicated to your service alone and will not operate in the service of any other member of the general public. He will be subject to your direction and command at all times, the same as his trucks will be and will have no regular schedules and no regular routes as common carriers must have, his trucks will be ready to operate from Wichita Falls or from other points at any hour of the day or night which you may direct in order to render the service which you require and will operate over most direct routes to any destination to which your commodity will move without awaiting scheduled departure times and without the interlining of the shipments at connecting carrier points, as well as many other services which cannot at all be rendered by common carriers.

It may not, therefore, be said that the service which will be rendered by this contract carrier can never in any event be a substantially similar service to that rendered by common carriers.

The Railroad Commission of Texas, in the almost ten years now since the Truck Law was passed as it now exists has not at any time undertaken an investigation of the services rendered by contract carriers nor have they undertaken any investigation of the cost of such service or any of the other factors which would enter into rate making. [fol. 202] Of course, you do not know about these costs or advantages either, because you have not operated with the benefit of a contract carrier. Just what operating cost would be and what particular advantages will be worth then as may be anticipated cannot now be determined by you without some experience.

It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supplemental contract be entered into based upon the service rendered. That such an arrangement will not be violative of the provision of the statute quoted in my letter of April 3rd, for the very simple reason that the two services, that is, contract and common carrier service cannot be compared so that it can never be said

that the two services rendered could be "substantially the same."

We have given considerable thought to various other elements entering into consideration of whether or not you should make this contract as suggested by yourself this morning, that is various contingencies that might arise following the execution of the contract and the institution of the operation. We think, however, that you fully understood our position with reference to those matters and I do not believe that any complication could possibly arise on account of any of those things, and since it is my impression that you wished our opinion with reference to the particular section of the statute involved along we do not assume that it is necessary for us to discuss those matters.

Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and [fol. 203] the service actually rendered in comparison to service of common carriers. To me, however, it is simply a reasonable business risk, if it is a risk, which you can afford to take.

Very truly yours, T. S. Christopher.,

tsc/ds

Mr. McKnight (to the witness):

Q. Mr. Colfix, you received that letter, then what did you do?

A. I referred that letter and all of the other correspondence on that subject, which has been read in this Court room, to our legal department in Minneapolis and also to our legal attorneys in Oklahoma City.

Q. Mr. France here was your attorney in Oklahoma City, and he was the attorney to whom the matter was referred to?

A. That is correct.

Q. Do you know whether or not he had any discussion about this contract with attorneys for Mr. Steele?

A. He had a telephone conversation with them about it.

Q. Were you present at the time?

A. No, sir.

Q. Then it would not be proper for you to testify to it. Was there some amendment made to this clause 13 which

Mr. Christopher and Mr. Morgan had suggested before it actually went into the agreement?

A. Yes.

Q. Without taking them and comparing them, can you point out the words that were added or deleted?

A. Yes.

Q. What words were they?

A. In paragraph 13, the phrase is added: "For the kind and character of service to be rendered hereunder."

[fol. 204] Q. That is not in the paragraph suggested by Mr. Morgan and Mr. Christopher in these letters?

A. That is correct.

Q. And your attorneys caused that additional phrase to be added?

A. Yes.

Q. Well, now, I hand you Plaintiff's Exhibit No. 6, and ask you, sir, what that is?

A. That is our file copy of a letter written by me under date of April 17, 1941, to Mr. T. S. Christopher of Culbertson, Morgan, Christopher & Bailey at Ft. Worth, Texas.

Q. And you mailed the original of that to Mr. Christopher?

A. Yes, sir.

Mr. Morgan: We make the same objection to that letter.

The Court: I overrule the objection.

Mr. McKnight: We offer in evidence a carbon copy of the letter just identified, dated April 17, 1941, and marked Defendant's Exhibit No. 6, as follows:

DEFENDANT'S EXHIBIT No. 6

DEAR MR. CHRISTOPHER:

Yesterday you discussed with Mr. France a change in paragraph 13 of the contract between Mr. Steele and General Mills. As a result of this conversation you both agreed to add the following phrase to the end of Paragraph 13, "for the kind and character of service to be rendered hereunder." We have made this change and have executed two [fol. 205] copies of the contract which are being sent to you at this time.

After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement

for costs as may be agreed upon between Mr. Steele and General Mills.

I did not indicate the date of execution on Page 1 and page 5, as I thought it might make some difference as to whether or not the present date was indicated or whether you wanted to go back to the time you started your hearings with the Railroad and Warehouse Commission. Will you please investigate this date and advise me in order that I might place it on my copy.

Very truly yours, General Mills, Inc., Southwestern Division, L. B. Colfix, Comptroller.

LBC/FH.

Encls.

cc: Mr. L. H. Steele.

Mr. McKnight (To the witness):

Q. Mr. Colfix, just for the purpose of identifying what we are talking about, I hand you here what has been or what appears to be an executed copy of a contract marked defendant's Exhibit No. 7. Is that the executed copy of the contract, a copy of which was introduced in evidence by the Plaintiff yesterday as Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. In other words, this is the executed original and that is just a copy?

A. That is right.

[fol. 206] Q. Now, is this your office copy?

A. That is the copy they returned to us, they signed two copies and they kept one and returned one.

Q. This is the one they sent you back?

A. Yes, sir, that is correct.

Q. When you sent this contract down on April 17, with the signature of General Mills to it, this letter indicates that the contract was not dated at that time?

A. That is correct.

Q. And it came back, did it, on this date, August 26, 1940?

A. No, that date was not inserted until later.

Q. But it was later inserted?

A. Yes.

Q. That was still a blank date when it got back to you?

A. Yes, that is correct.

Q. But it was finally inserted in both drafts, was it?

A. It was in our draft, I do not know about the other draft.

Q. You are not sure about that?

A. No.

Mr. McKnight: I do not believe it is necessary to offer this at this time, it just clutters the record, it is the same as their Exhibit No. 1.

(Defendant's Exhibit No. 7 is not copied in this record because it is the same as Plaintiff's Exhibit No. 1, which appears beginning on page 116 of this record.)

Mr. McKnight:

Q. Mr. Colfix, was a supplemental contract drawn up and executed between the parties following this letter which you sent to Mr. Christopher on April 17?

A. Yes.

[fol. 207] Q. Who prepared the supplemental agreement if you know?

A. It was prepared by our attorney, Mr. France in Oklahoma City.

Q. Did you deliver it to Mr. Steele or forward it to him?

A. I do not recall whether I delivered it personally or sent it by mail, but it was delivered to him.

Q. And was the same executed by him and returned to you?

A. Yes.

Q. I hand you defendant's Exhibit No. 8, and ask you if that contract marked Defendant's Exhibit No. 8, is a supplemental agreement to which you referred?

A. Yes, sir, it is.

Q. Well, now, let me ask you this: In lieu of the first draft of this proposed agreement—I do not mean the supplemental agreement, but the first draft of the proposed agreement that you gave to Mr. Steele, containing paragraphs, according to this letter, 13, 14, 15, 16 and 17, which were deleted, according to your testimony, and there was inserted in lieu of these paragraphs what now appears to be paragraph 13, that is correct, is it not?

A. It is.

Q. If these original paragraphs 13, 14, 15, 16 and 17, as contained in this original draft of the contract contained any of the provisions, or set forth any of the provisions that are now set forth in this supplemental contract marked Defendant's Exhibit No. 8?

A. Yes, this contains all of those provisions.

Q. Are they contained under what is designated as paragraph No. 1, numeral one?

A. Yes.

Mr. McKnight: We now offer in evidence Defendant's Exhibit No. 8.

[fol. 208] Mr. Morgan: In addition to the objection heretofore made, as to this instrument in particular, we are going to urge the Court not to allow this to go in evidence for the reason it is an illegal contract made in violation of every rule, order or regulation that was ever promulgated by the Railroad Commission, and specifically it is in violation of the rate order as fixed by the Railroad Commission of Texas, and in direct violation of the statutes of the State of Texas, and in violation of the contract upon which the parties, plaintiff and defendant made representation to the Commission to get a permit, and made long subsequent to the time the permit was granted, and therefore certainly is not admissible for any purpose.

The Court: I overrule the objection, with the reservation heretofore made.

Mr. Morgan: Note our exception, and on all the other objections too.

Mr. McKnight: We offer in evidence Defendant's Exhibit No. 8.

DEFENDANT'S EXHIBIT NO. 8

Supplemental Agreement

This Agreement, Made and entered into this 31st day of July, 1941, by and between Leo H. Steele as first party, and General Mills, Inc., a corporation, as second party, and as a supplement to and amendment of the contract between the parties hereto heretofore executed under date of August 26th, 1940, Witnesseth: That,

[fol. 209] Whereas, the parties hereto entered into a certain transportation contract under date of August 26th,

1940, as above referred to, and by the terms of paragraph 13 thereof, it was mutually agreed that the compensation to be paid for the services thereunder to be rendered by first party, or the rates to be charged by first party and paid by second party should be such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas and in conformity with the rules and regulations then in existence or that might thereafter be promulgated by said Commission for the kind and character of services to be rendered thereunder; and,

Whereas, the Railroad Commission of the State of Texas has not fixed rates, charges or tariffs for the kind and character of services to be rendered under said contract; and,

Whereas, the parties desire to specifically agree upon the compensation to be paid to first party by second party for the services rendered or to be rendered under said contract, and, to supplement and amend said contract as set forth herein:

Now, Therefore, premises considered and for the considerations contained in the original contract of August 26th, 1940, and herein contained, it is Mutually Agreed as follows, to-wit:

1. Paragraph 13 of said contract of August 26th, 1940, is supplemented and amended to read as follows, to-wit:

"13. It is mutually understood and agreed that the Railroad Commission of the State of Texas has not fixed any rates, charges or tariffs, and has not promulgated any rules and regulations respecting, for the kind and character of service to be rendered hereunder, and that the [fol. 210] cost to second party to be paid to first party for the services rendered or to be rendered under this contract shall be calculated upon a cost plus basis as hereinafter set forth, and in this connection, first party agrees to keep and maintain upon proper books and records a separate account with respect to each single transportation unit used in the performance of this contract, the same to be itemized and closed or balanced monthly, and showing the respective cost and expense of operating and maintaining each such transportation unit, which shall include therein the following items of expense of the performance

of this contract, which shall be the actual and reasonable cost of:

(a) Administrative overhead expense, which shall include the salary of Leo H. Steele, at the rate of $100.00 per month, together with the actual cost of his telephone and telegraph expense and traveling expense incurred in connection with the performance of this contract.

(b) The actual cost or expense of mechanical labor for the upkeep of the transportation units used in the performance of this contract.

(c) The actual cost or expense of the labor for washing and greasing the transportation units used in the performance of this contract.

(d) The actual cost of compensation or wages paid for a transportation unit dispatcher, as required in the performance of this contract.

(e) A monthly depreciation charge of 1/12th of 33-1/3 per cent of the actual purchase price paid by first party *party* for the respective motor truck and trailer fully equipped used in the performance of this contract, to the end that the cost of such transportation equipment shall [fol. 211] be fully depreciated by the end of the third year of use, and thereafter no further item of depreciation shall be included in such monthly account.

(f) The wages or salaries paid to motor truck drivers or operators for services in the performance of this contract.

(g) The traveling expense of motor truck drivers or operators while employed in the performance of this contract consisting of reasonable expenses for meals, where paid by first party.

(h) Actual expense of operating the respective transportation unit in the performance of this contract, consisting of the cost of:

1. Gasoline.

2. Oil.

3. Grease.

4. Ordinary wear and tear repair parts.

5. Truck and trailer license.

6. Tires and tubes.

7. Insurance and fidelity bond premium costs.

8. Ad valorem taxes.

9. Road, mileage, or gross revenue taxes, if any.

10. Miscellaneous expense of the operation, maintenance and upkeep of the respective transportation unit, usual and [fol. 212] customary in, and arising out of the careful, prudent, and proper operation thereof, to be properly identified and itemized.

(i) Any other taxes, including, but not excluding taxes not specifically named, except State and Federal income taxes which are excluded, taxes arising from the employment of persons in connection with the performance of this contract for:

1. State social security.

2. Federal social security.

3. State unemployment compensation.

4. Federal unemployment compensation.

(j) An item representing ten per cent of the total of the above costs, excepting the items of general overhead costs and expense, traveling expense of motor truck drivers or operators as set forth in (g) above, depreciation, State and Federal social security and unemployment taxes or charges, ad valorem and all other taxes and bond premium costs, provided: That when insurance premium costs and truck license costs are advanced by second party, such costs shall also be excluded in calculating the ten per cent referred to herein.

Second party shall be allowed the benefit of all discounts that are available in the purchase of equipment material or supplies.

2. As a further supplement to said contract of August 26th, 1940, it is mutually agreed that second party assumes and carries the risk of any injury or damage to all cargoes transported under the terms of said contract, and that first

[fol. 213] party shall not be liable or responsible for injury or damage to such cargoes.

3. It is specifically understood and agreed that, except as supplemented and amended hereby, the said contract between the parties hereto dated August 26th, 1940, shall be and remain in full force and effect in all its terms and provisions.

Executed at Oklahoma City, Oklahoma, the day and year first above set forth.

Leo H. Steele, First Party; General Mills, Inc., by J. S. Hargett, Second Party.

Mr. McKnight:

Q. Mr. Colfix, this supplemental contract which I have just read to the jury, makes some reference to certain trucks which Mr. Steele is allowed a depreciation on as operating expense, where did he acquire those trucks?

A. General Mills sold the trucks to Mr. Steele.

Q. Were those the same trucks that you had been operating in performing this same delivery service before he undertook this contract?

A. Yes.

Q. Had those trucks been designed by you especially for your use?

A. That is correct.

Q. The depreciation allowance would pay the cost of them in three years as I understand it?

A. Yes, sir, that is correct.

Q. After that, they were not subject to depreciation?

A. Yes, sir, that is correct.

[fol. 214] Q. After this contract was made were, did you undertake, or did the company undertake with Mr. Steele the performance of this contract?

A. Yes.

Q. I notice that among the items of expense that is allowed to Mr. Steele, $100.00 per month salary, and was that later increased before you started out?

A. That was increased immediately upon starting the contract.

Q. To what figure?

A. To $150.00.

Q. Is that the figure that was allowed throughout the performance of the agreement, $150.00?

A. That is correct.

Q. Did Mr. Steele send in periodically invoices covering the amounts due him for transportation services he was handling for you?

A. Yes, he did, each month.

Q. Were settlements made with Mr. Steele periodically on the basis of the invoices which he sent you?

A. Yes.

Q. In these invoices did he bill you for his services in accordance with the terms of the supplemental contract which I have read, with slight amendment changing the salary from $100.00 to $150.00 per month?

A. Yes, he did.

Q. Did you pay him the amount which was billed to you on these invoices?

A. Yes, sir.

Q. Did these invoices which he sent you from month to month, ever attempt to bill you on the basis of any railroad tariff rates of the Railroad Commission of Texas, tariff rates?

A. No, he never did.

[fol. 215] Mr. McKnight: I am not going to undertake to offer all of these in evidence, but I want to introduce one as a sample. (Referring to Defendant's Exhibit No. 9.)

Q. How many months did this operation continue?

A. From August 1, 1941 through October 31, 1943,—27 months is my recollection.

Q. 27 months operation?

A. Yes.

Q. Did he bill you currently each month covering that month's operation?

A. At the close of each month he billed us.

Mr. Morgan: Our objection goes to all of this for all of the reasons heretofore stated.

Mr. McKnight: Yes.

The Court: Yes, that's right.

Mr. McKnight:

Q. Have you here with you the invoices which Mr. Steele sent you every month for those 27 consecutive months?

A. Yes, sir.

Q. I hand you Defendant's Exhibit No. 9, and ask you what that is?

A. That is a statement that Mr. Steele sent us for operations covering the month of August, 1941, which represented his invoice to us for services performed in accordance with our contract and supplemental agreement.

Q. That is the first month's operation?

A. That is right.

[fol. 216] Q. Thereafter at the end of each month did he send you an invoice on a similar form to that?

A. Yes.

Q. Using the same basis of calculation?

A. That is correct.

Q. Was this and each of the invoices paid?

A. Yes.

Q. And I believe you said all of them are here?

A. That is correct.

Mr. McKnight: We offer in evidence Defendant's Exhibit No. 9,——

Mr. Morgan: We object to it, the same objection.

Mr. McKnight: Yes.

This is on the letter-head of Steele Distributing Company, and seems to be a mimeographed copy of operating statement, accounting here for a number of trucks for the period of August, 1941. I will not read each item to you, because it would take up too much time, but I am introducing it.

It gives a list of operating expenses: Depreciation, license, insurance, and fixed expenses, like gasoline and oil and maintenance and repairs and tires and driver's salary and helper's salary and dispatcher's salary, and the total operating expense for that month, $874.02, and then it takes 10% off that, or $87.40, and then adds divers statements and certain taxes and revenue and social security, and various and sundry items that make a total of $1483.70, and then that is broken down showing the average cost per trip, and that kind of matter, which is here for your examination.

[fol. 217] (Defendant's Exhibit No. 9 heretofore identified and introduced in evidence is a tabulated statement of operating expenses and is to be sent up in its original form by order of the Court.)

Mr. McKnight (To the witness): Mr. Colfix, from month to month, as these statements were submitted to you, the figures would vary according to the operating conditions in that months?

A. Certainly.

Q. But the same basis would be used?

A. Yes, sir.

Q. Now, during the entire period of this operation, before its termination, some 27 months after it started, did Mr. Steele ever make any claim to you that he was entitled to be paid on the basis of the Railroad Commission's tariff rates?

A. No, sir.

Q. Was there any such claim as that ever presented to you until after the termination of this agreement?

A. None.

Q. Mr. Colfix, has the General Mills Inc., ever used common carriers to make deliveries of the type of services which were performed by Mr. Steele due under this contract?

Mr. Morgan: That calls for a conclusion and we object to it.

The Court: I overrule the objection.

Mr. Morgan: We except.

A. No.

[fol. 218] Mr. McKnight:

Q. Did you consider the type of service, if any, available, from common carriers, adequate to take care of your needs in your delivery service of this character that we are talking about?

Mr. Morgan: I object to all of that, in addition to the objections heretofore urged, and that calls for a conclusion upon the part of the witness, and his opinion.

Mr. McKnight: I will change the form of the question to meet the objection——

Q. Was the type of service that was available from common carriers adequate to meet the company's needs in the distribution of its products within this area that was served by Mr. Steele?

Mr. Morgan: We make the same objection.

The Court: I overrule the objection.

A. It was not, the common carrier service.

Mr. Morgan: I object to all of this kind of testimony.

The Witness: The common carrier service in many cases could not reach the points to which we distributed our products. The type of service that they offered was not satisfactory for our competitive needs. Our business not only distributes, covers not only the distribution of the [fol. 219] products, but it covers the giving of service to our customers for us, and the common carriers could not give to us the type of distributive service that we must have to meet our competitive needs and maintain our business in that area.

Mr. McKnight:

Q. I will ask you this, are you familiar with the type of delivery service that is maintained by other milling companies throughout the southwest, to that particular class of trade which Mr. Steele served?

A. Yes, sir.

Q. What is the general practice of other milling companies with respect to the manner in which they deliver products to that type of trade?

Mr. Morgan: If your honor please, we respectfully submit that what other milling companies may do is not admissible in this case.

Mr. McKnight: I think it is very admissible, it shows the custom not only of this company but might of other milling companies that use their own trucks to serve this particular class of trade.

Mr. Christopher: It might do that, but he was not using his own trucks on this contract or under this contract and arrangement whereby these commodities were being transferred.

The Court: What do you think would be the point in his testimony——

[fol. 220] Mr. McKnight (Interrupting): On the question of whether or not this is a competitive operation. The evidence shows, if the Court please, after Mr. Steele took this operation, other than the fact that he was called a contractor, it was the same as if the company had been doing it itself.

The Court: You are introducing it on the theory and bearing on the question of competition of common carriers or with common carriers?

Mr. McKnight: That's right.

The Court: I overrule the objection.

Mr. Morgan: We except to all of this.

Mr. McKnight: Do you know the custom of other companies common milling companies in this area, the southwestern area, in making deliveries on this class?

A. Yes.

Q. What is the custom?

A. All milling companies in this area distribute their products adjacent to their mill by means of their own trucks.

Q. Do they use common carriers for that purpose?

A. No.

Q. What problems then did you have facing you that made it necessary to solve in your transportation service to this class of trade in this area, that made it impractical for you to use common carriers?

[fol. 221] The Court: That is very leading.

Mr. McKnight: He has said that there was a moment ago—I'll change the form of the question.

Q. I will ask you this question, did you have any problems in your business—did you or not have any problems in your business which required you to use this character of service rather than common carrier services?

A. Yes, we did.

Q. All right, tell us what they were?

Mr. Christopher: We object to that for the simple reason it certainly is incompetent and irrelevant and immaterial to any issue involved in this lawsuit. Whatever problems he may have had in his company certainly could have no effect on the transportation or competitive conditions in transportation, furthermore, it is purely a collateral attack on the order of the Railroad Commission fixing rates, rates relating to public transportation companies, and it is all perfectly inadmissible.

Mr. McKnight: Counsel seems to have changed its mind about it in the last two or three years; but aside from that, the service is a part of the transportation problem and

that is one of the reasons why this type of service is necessary.

The Court: I overrule the objection.

Mr. Christopher: Note the exception, and may we have objection to this line of questioning?

[fol. 222] Mr. McKnight: Yes, as far as I am concerned.

Q. Go ahead?

A. We had a number of problems.

Q. Outline some of them?

A. Many of our customers were not at locations which could be served at all or at least quickly with common carrier service. Our product is a food product and it is very susceptible to picking up contaminations, that is odors, then in placing our product in a truck of a common carrier, you might place that product next to some other that gives off an odor, and for that reason we must place our products in a carrier by itself so that it will not have that hazard.

Q. Right there, is it necessary to take any means to keep the truck in suitable condition for transporting your products?

Mr. Morgan: I object to that as leading and suggestive.

The Court: I overrule the objection.

The Witness: Yes, we have specially built truck beds for the purpose of carrying our commodities. Most of our products are in cotton or paper sacks which can be readily torn or broken, and unless the inside of the truck body is smooth, there will be a large loss from handling, and we also have to have truck bodies that keep out the elements, water and gas and things of that nature, so that the product will be delivered clean and in a wholesome condition. We have the further problem in our transportation of giving more than transportation from the point of the manufacturer to the customer's place of business.

[fol. 223] We must take our product into the customer's place of business——

Mr. Morgan: That is beyond transportation and he cannot testify to that.

Mr. McKnight: That is one of the services this man was required to perform under the contract.

Mr. Christopher: Though, the cont-act on its face——

Mr. McKnight (Interrupting): I beg your pardon, and certainly the incidental features that went along with this

service, the needs and factors of the business are certainly material for the purpose of determining whether or not the services were competitive or substantially the same.

The Court: You mean the convenience of truck service over railroad service?

Mr. McKnight: That is right, these things of handling, as we propose to show is valuable, and could not be obtained from common carriers but is necessary in the distribution of the products.

Mr. Morgan: He means common carrier truck lines.

Mr. McKnight: I mean common carrier truck lines or railroads, either way.

[fol. 224] Mr. Christopher: There is a statement of something or another that goes clear beyond the question of transportation, and I do not know what he is going to say, as it may relate to this order of the Railroad Commission fixing rates. This carrier is not under contract, either by the terms, or anything that has been introduced here, or any obligation of law either statutory or common to perform services beyond transportation. We object because it is immaterial, incompetent, irrelevant——

Mr. McKnight: We propose to show the Court the conduct was under this contract and compare it with common carriers.

The Court: I will let that go in.

Mr. Morgan: We except.

Mr. McKnight:

Q. Do you recall where you stopped?

A. It is necessary in the distribution of our products, not only to deliver to the place of business, but take it into the place of business. In the case of a bakery or if we have baker's flour, we will pick up the sacks of flour and stack them where requested by the baker. A common carrier usually places it on the outside of the building or some distribution point that they maintain, and in the case of other flour, it is necessary f · us to take that product in the place of business of the customer and stack it neatly and orderly so it makes an attractive pile of our product, and bring the old stock to the front so the stock will always be — fresh and current condition and generally to see that that stock generally is kept in an attractive condition. It is also necessary for our drivers to be of service

[fol. 225] to our customers and report any complaints and assist us and our sales department in the conduct of that distribution.

It is sometimes necessary for our truck drivers to bring back dirty and torn sacks of flour which are no longer wholesome and valuable for distribution, and which common carriers do not do.

Mr. Christopher: The witness having gone into that, your Honor can see the immateriality of the statement as related to transportation, and we move that the statement be stricken and the jury be instructed to disregard the statement.

The Court: I overrule the motion.

Mr. Christopher: We except.

The Court: We will take a recess of ten minutes.

(After recess.)

Mr. McKnight (Interrupting): Mr. Colfix, you have outlined a number of problems that you said existed in your delivery of your merchandise, outlined such things as being essential; I will ask you whether or not any of those services which you outlined as essential were available from common carriers?

A. They were not.

Q. In this area that is served by Mr. Steele, as in the main, where shipments in truckload lots to one customer or were they in broken packages?

A. Generally speaking, a truck would be loaded with a number of orders for a number of customers and they would — dropped off along the route of delivery.

[fol. 226] Q. In making those deliveries, would the truck make numerous towns at times?

A. It would make numerous towns and would stop at places between towns where there would be any merchant.

Q. Primarily, what commodities did trucks carry from your mill at Wichita Falls?

A. Principally flour.

Q. Sacked flour?

A. Yes.

Q. In making various stops, I will ask you generally how the trucks traveled, over what route?

A. They would not always be the same route. They would try to include towns and stops necessary to make

delivery of the goods at previous places made by the salesmen.

Q. What was done with the trucks when all the deliveries had been made?

A. The trucks were returned to the plant.

Q. Were they returned with a return cargo or empty, or both ways?

A. Under such circumstances, they would bring back some damaged flour, as I mentioned before, and there were occasions that they might be given an order to pick up wheat from some of our country elevators, or it would be possible for them to pick up machinery and stocks as needed in the operation of our business.

Q. Was that done on the orders of General Mills plant at Wichita Falls?

A. Usually on the order before they left the building, sometimes the plant would catch them en route and change their direction.

Q. You say they haul wheat also as well as flour?

A. On the return trips, yes, sir, some times.

Q. Back to the mill?

A. Yes.

[fol. 227] Q. Wheat that you purchased to process at your mill at Wichita Falls?

A. Yes, that is correct.

Q. Were the truck bodies designed for the purpose of carrying wheat?

A. Yes, you had to have a type of truck that would be tight enough to keep wheat from leaking out, and you also have to have a covering over the top.

Q. And these trucks, I believe you say have been designed for that purpose?

A. That is correct.

Q. And were used for that purpose?

A. Yes, sir.

Q. Have you had any experience hauling wheat by common carrier?

A. We never have to my knowledge.

Q. Is the character of service that is available from common carriers practicable in making these hauls of wheat back to your plant at Wichita Falls?

A. The equipment is not satisfactory.

Q. Is this hauled in bulk or in sacks?

A. It is in bulk.

Q. Bulk wheat?

A. Yes.

Q. Now, in Mr. Steele's operation during the time this contract was in force, where did he maintain his office?

A. Generally speaking, he maintained his office at our plant. He shared a little room on the first floor with our city department.

Q. Where did he keep his trucks when they were not in use?

A. In the yard adjacent to the plant on our property.

Q. On your property?

A. Yes.

Q. Did he have or maintain any terminals or warehouses or anything of that sort for his trucks?

A. No.

[fol. 228] Q. When his trucks, say, would go down to Ft. Worth or to Abilene or some other point, and would stay over night, what would happen?

Mr. Morgan: We must insist on objection to that, for the reason this is all hearsay. This witness has not testified yet that he knows what became of the trucks.

Mr. McKnight: I will withdraw the question until I find out if the witness knows about it.

Q. Do you know what was done with the trucks over night when he would go out here on the road and have to stay over night at a place before he came back to Wichita Falls?

A. No, I do not know what they did with the trucks when they were out.

Q. Is Mr. Steele billed with any charges or costs for the use of your facilities at Wichita Falls?

A. No, sir.

Mr. Morgan: Now, if your Honor please, that is objectionable.

Mr. McKnight:

Q. Did Mr. Steele, during this period of this contract, during the period this contract was in effect, handle products for any one else except General Mills?

A. Not that I know of.

Q. How long did you say you had been in the flour and mill business, Mr. Colfix?

A. Since April 1, 1924.

Q. During that time, I will ask you whether or not the competitive condition in the milling business has increased or decreased?

[fol. 229] Mr. Morgan: We object to that, that is wholly immaterial the competitive condition between mill and mill, no transportation is involved in that at all.

Mr. McKnight: It is very material. It is offered for the purpose of showing—I ought to ask two or three questions before I come to this ultimate thing I am attempting to show, but it is offered for the purpose of showing that due to competitive conditions over a long period of time in the milling business, competitive conditions that these mills in the distribution of their products has reached the point in which it is necessary on account of competitive conditions to give the service in the distribution of their products that involves something else more than the hauling of the property. That is the purpose of the question.

The Court: I overrule the objection.

Mr. Morgan: We except.

The Witness: For the class of business handled in our adjacent area, our competitive situation has increased materially in the last few years.

Q. Has the increase in that competitive condition caused or had any effect rather upon the method of distribution of your production within this trade area we are asking about?

A. Yes; it has caused us to give more service to the customer to retain his business.

[fol. 230] Mr. McKnight: I will ask you whether or not at the time you entered into this agreement with Mr. Steele that back there in 1941, if the distribution of your products required anything more than the mere hauling of it to meet this competitive condition?

A. Yes, it requires various types of service that I mentioned a few minutes ago.

Mr. McKnight: I believe that's all.

Cross examination.

By Mr. Morgan:

Q. May it please the Court, for the purpose of the record, we want it strictly understood that by our cross ex-

amination of this or any other witness that we are not waiving any contention or position that we have urged.

The Court: Oh yes, you have objected to all of this line of testimony, of course; whatever your cross examination is you will be protected.

Mr. Morgan:

Q. Mr. Colfix, who prepared this first contract?
A. It was prepared by our company.
Q. Who in your company?
A. I do not recall whether that first contract was a copy of the same type of contract we had, that was sent down to Mr. Steele or whether or not he took that form of contract and inserted in it his name, I think it was done by one of the employees in our office.
Q. You cannot tell his name, the name of the employee?
A. If we made it, it was probably an employee by the name of Jussiud.
[fol. 231] Q. Is he a lawyer?
A. Yes.
Q. Mr. Steele did not prepare the contract?
A. That is correct.
Q. Nor did Mr. Steele's attorneys prepare the contract?
A. That is correct.
Q. This letter last referred to is, the one with my name signed to it, that is the first time, so far as you know, that I ever appeared in this section?
A. That is correct.
Q. That is a letter addressed to Mr. Steele, which you say was a letter delivered to you?
A. That is correct.
Q. Up to that time you never had occasion to go into our office at all, have you?
A. That is correct.
Q. Did our law firm ever represent General Mills in this contraction?
A. No, sir.
Q. Did our law firm ever represent General Mills in any contraction?
A. No.
Q. Now, then, this letter addressed to Mr. Steele, and which has been introduced as Defendant's Exhibit No. 1,

you say that was the first time you heard from our law firm?

A. That was the first time I heard directly, yes.

Q. That is my letter to Mr. Steele?

A. Yes.

Q. At the time you heard from us, we told you that these paragraphs, 13, 14, 15 and 16 were illegal and could not be inserted in your contract didn't we?

A. I do not believe you said they were illegal.

Q. Let's see what we say.

[fol. 232] Mr. McKnight: The letter speaks for itself.

Mr. Morgan:

Q. Paragraph 13, 14, 15 and 16 are set forth on pages four to seven, are in direct conflict with the statutes of the State of Texas and therefore they must be eliminated from the contract. Those paragraphs to which our reference was made are the ones relating to rates and charges. That is true, is it not?

A. That is correct.

Q. Therefore, in lieu of that you were advised that you must eliminate or delete those from our contract weren't you?

A. That is correct.

Q. And in lieu of that you were told that you should insert in that contract a stipulation as follows:

"It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence, or that may hereafter be promulgated by this said commission."

You were advised of that fact weren't you?

A. By that letter, yes.

Q. By this letter that you received from our office?

A. Yes.

Q. Now then, when you first started out, the first word you got from this law firm, they told you you could not do it, could not provide rates as fixed in your original contract, but you must put in this paragraph here, is that correct?

A. Yes.

[fol. 233] Q. All right, now, then, the next thing that happened, you wrote a communication to Mr. Steele in which you pointed out to him—you copied that identical quotation from my letter and pointed out to him that it would appear from this that if we are to live up to the contract that the basis of charges he would make to us would be the rate specified by the Railroad Commission of Texas, that was your understanding, was it not?

A. No, it raised that question.

Q. You say in your letter here: "It would appear from this that if we are to live up to the contract that the basis of charge you would make to us would be the rate specified by the Railroad Commission" that is in your letter. Therefor, did you not at that time, Mr. Colfix, understand that if you put a provision as recommended by our new form in your contract that you would then be required to pay the charges fixed by the Railroad Commission?

A. No, that is not my understanding, that last question as to whether that would be the way to do that, I did not understand it, that was the reason I came to talk with you people.

Q. When you got that letter, you got in mind then that if you inserted the portion as suggested that you must charge this tariff of rates as fixed by the commission, didn't you?

A. No, I did not get that in mind.

Q. You did not get that?

A. No.

Q. After writing me a letter, you did not understand that?

A. No, I sure did not.

Q. You said here, you said in your letter, "It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the [fol. 234] rate specified by the Railroad Commission", you said that didn't you?

A. Yes, but that had to be taken into consideration with the rest of that letter.

Q. The next thing that happened you received a letter from Mr. Christopher addressed to you?

A. Yes.

Q. In that letter Mr. Christopher pointed out to you the exact statute, giving the number of the articles in which the Railroad Commission is vested with authority to fix rates, you got that letter, didn't you?

A. Yes.

Q. You got a letter from Mr. Christopher telling you in this letter you had from him that it was the duty of the Railroad Commission to fix rates between the contract carrier and the shipper, didn't you?

A. Yes.

Q. Now, in this letter Mr. Christopher went so far as to point out to you and copy for you the terms and provisions of Article 911b, which provides:

"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this state and Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

You read that letter, didn't you?

A. Yes.

Q. That is under date of April 3, 1941, Mr. Christopher wrote you that letter?

A. Yes.

[fol. 235] Q. Now you addressed a communication under date of April 5, which Defendant has identified as Exhibit No. 4, addressed to Mr. Steele, in which you say this:

"Since there are a number of things in the letter which appear unsatisfactory to us, I believe we should investigate the matter further."

And things were unsatisfactory to you?

A. To begin with, it was our agreement with Mr. Steele that the contract was on a cost plus basis, and then this payment came up through you people and Mr. Steele, something about a Commission rate, and the best I can find out from the conversations and discussions with people, there were no commission rates promulgated for this type of service, and I could not understand how we could talk about a commission rate and have no commission rates provided, and it was unsatisfactory and I could not understand it and so I thought it was well for us to find out something about it.

Q. You could understand the letter that you wrote and the one that Mr. Christopher wrote, pointing out the exact status and terms that should go into the contract?

A. Yes, sir.

Q. You understood that?

A. Yes.

Q. The last instrument referred to is a letter Mr. Christopher wrote to you confirming the conversations he had in the office, and Mr. Colfix, do you not recall that you and Mr. Steele and Mr. Christopher had that conversation in my absence?

A. You were in there a few minutes.

Q. That is right, I paid my respects and left?

A. I remember that.

Q. In that letter, and in your conversation on that occasion, with Mr. Christopher, wherein he suggested to you among other things:

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is pro-[fol. 236] posed by Mr. Steele, now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supplemental contract be entered into based upon the service rendered."

Now, Mr. Colfix, do you recall this letter confirming that point relating to the discussion with Mr. Christopher, and that he said he had something interesting to suggest, and his suggestion was to you that you go ahead and sign your contract as provided—as we had suggested, that after you had had some experience based upon that experience, if the permit was granted, that you could go back to the Railroad Commission, based on that experience, and get whatever modification, if any, in rates that the Railroad Commission might see fit to grant?

A. That was not my understanding.

Q. That was discussed

A. Shall I give you my interpretation—

Q. (Interrupting.) That point was discussed?

A. It was discussed, yes, sir.

Q. Didn't Mr. Christopher tell you on that occasion that pursuant to section No. 13 of the general application of rates and being that the rate order that we introduced in

evidence here, and it is shown in Exhibit E I believe, and it is our exhibit four or five that we introduced here, didn't Mr. Christopher tell you on that occasion that the contract carrier must charge as a minimum the same rate as motor carriers, common carrier motor carriers?

A. No, sir, he did not.

Q. Did not tell you that?

A. No, sir.

Q. Didn't he on that occasion suggest to you that after you had had some experience, that there was a provision [fol. 237] in the order which says unless issued by the commission, providing to the contrary, that you could go back to the Commission, based upon your experience and get a modification?

A. No, that was not discussed in this meeting that we had.

Q. I thought you said a while ago it was discussed?

A. Did not discuss the going ahead and using different rates and then latter making application to the Railroad Commission for an amendment of those rates, that was never discussed. Shall I give you my interpretation of that discussion?

Q. No, answer the question; I do not care for your interpretation.

Mr. McKnight: He is entitled to state his recollection.

The Court: No, just answer the questions.

Mr. McKnight: We except.

Mr. Morgan:

Q. Now then, Mr. Christopher's letter to you that counsel read to the jury, in Mr. Christopher's letter to you, you understood that he told you, and do you now understand that he told you that after you had had some experience, based on that experience, you might then go to the commission and ask for a modification?

Mr. McKnight: If the Court please, I object to that because it is not stated in the letter, and counsel is asking him if he didn't interpret the letter as saying that, when it is not in the letter itself.

[fol. 238] The Court: I overrule the objection.

Mr. McKnight: We except.

Mr. Morgan:

Q. I will read that part to you.

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele, now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that is going to be necessary and under the law, entirely proper, that some supplemental contract be entered into based upon the service rendered."

You did talk about that, didn't you?

A. We talked about making a supplemental contract.

Q. Based upon experience didn't you?

A. No.

Q. No. So to that extent, your testimony is that Mr. Christopher's letter confirming your conversation relates to a subject not discussed?

A. Nothing was said about making rates based on our experience after we started operations.

Q. Now then, this letter that Mr. Christopher wrote was at your request that he confirm in writing what you had discussed there in the office that day was it not?

A. That is correct.

Q. And he wrote the letter while you were there, didn't he?

A. No.

Q. You got it the next morning?

A. After that, I do not remember, I got it shortly after that.

[fol. 239] Q. But immediately following your conversation with Mr. Christopher, he wrote a letter you understand that, don't you?

A. I do.

Q. Reading further: "That such an arrangement will not be violative of the provision of the statute quoted in my letter of April 3rd for the very simple reason that the two services, that is contract and common carrier service, cannot be compared so that it can never be said that the two services rendered could be 'substantially the same.'"

Now, I will ask you to tell the Court and tell the jury if this question as concerns your second contract with Mr.

Steele, I mean if it was not discussed with Mr. Christopher, that based upon experience, you should go back and make an application for modification of the rates?

A. There was never any discussion according to my recollection of basing it on experience or getting experience and going back to the railroad commission for an amendment to the rate. We did discuss what basis we should use when we started the contract. We had this particular problem, we mentioned in the contract we are going to use rates promulgated by the Commission for like services, and Mr. Christopher informed us that there were no rates published for that particular type of service, and that it would be quite in order for us before we started the contract, to make a supplemental agreement which would be in accordance with our original arrangement, cost plus contract.

Q. That conversation you are talking about is in conflict with Mr. Christopher's letter to that extent, isn't it?

Mr. McKnight: I do not think it is, and that is argumentative.

The Court: I overrule the objection.

[fol. 240] The Witness: On this question of experience, we had already had several months of experience under contract in another state, and also that we had had experience in the identical type of operation, so we knew the factors involved.

Mr. Morgan:

Q. What other subject other than the rates did you discuss with Mr. Christopher?

A. I recall no other subject.

Q. Did you discuss with him anything concerning the type of transportation services to be rendered by Steele to General Mills Inc.?

A. Oh, yes, that was in connection with the rates, that is correct.

Q. As concerning rates only?

A. It was because that service was different that the rates did not apply.

Q. But your trip to Fort Worth was occasioned by the fact that you were concerned about the rates to be charged by Steele and paid by General Mills, that is correct, is it not?

A. That is correct.

Q. And that is the reason you came and that is the subject that was discussed?

A. That is right.

Q. All right, now, then, if you had received these communications and suggestions and expressions of opinion from Mr. Christopher, and by me, after you had received this, you took all of those and turned them over to whom?

A. To Mr. France.

Q. The gentleman seated here in the Court room?

A. That is correct.

Q. He was your lawyer in Oklahoma City?

A. Yes, sir, that is correct.

[fol. 241] Q. He was a member of the law firm of Miley, Hoffman, France & Johnson?

A. Yes, sir.

Q. I believe you testified on direct examination that in addition to your Oklahoma lawyers, the matters were all mailed to your lawyers in Minneapolis?

A. That is correct.

Q. Minneapolis is the home office of General Mills, Inc.?

A. Yes.

Q. Oklahoma City is a branch office, that is correct?

A. Divisional office, yes.

Q. Then you submitted all of this matter after you had a conversation with Mr. Christopher and after these various communications that have been introduced in evidence, you submitted all of those to your legal department in Minneapolis and in Oklahoma City?

A. Yes, sir.

Q. Now, then, who then prepared this second contract?

A. You mean the supplemental agreement?

Q. Yes?

A. Mr. France.

Q. Have you ever talked to Mr. Christopher about that contract?

A. About the supplemental contract?

Q. Yes?

A. Only to this extent, that we discussed the necessity of making a supplemental agreement before we started our operation.

Q. That was the time you testified, that was when you and Mr. Steele came to Ft. Worth?

A. Yes.

Q. Was that the only conversation that you had with Mr. Christopher concerning this matter?

A. Yes.

Q. Of course you never talked to me about it at all?

A. No, you were in the office just a few minutes.

[fol. 242] Q. You did not talk to any other member of our law firm, Mr. Culberson or Mr. Bailey?

A. I never met those gentlemen.

Q. Then after these letters were exchanged, these communications that have been identified as exhibits 1-2-3-4-5 and 6, you turned it all over to your lawyer up there didn't you?

A. Yes.

Q. Under date of April 17, 1941, you wrote a letter to Mr. Christopher in which, among other things you said this:

"After full consideration of the matter, our attorneys"—to whom did you refer in your letter, when you said "Our attorneys"?

A. I was referring collectively to our firm, Miley, Hoffman, France & Johnson, in Oklahoma City, and the employees of our company in Minneapolis in our legal department.

Q. You had no reference of course to Mr. Christopher nor to me?

A. No.

Q. "Our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills."

You wrote Mr. Christopher that letter?

A. Yes.

Q. You relied upon the contract as prepared by your lawyers didn't you?

A. Yes.

Q. You acted under their advice didn't you?

A. Sure.

Q. You did what your lawyers told you to do didn't you?

A. Yes.

[fol. 243] Q. And your lawyers told you they thought it would be all right didn't they?

A. That is correct.

Q. Did you, Mr. Colfix, understand that the first contract, the one that has been introduced in evidence here; did you understand that contract was submitted to the Railroad Commission of Texas in support of Mr. Steele's application for a permit?

A. It is just my understanding that it was to be submitted for that purpose.

Q. Did you see the contract after these paragraphs 13-14-15-16 and 17 were deleted and the section that I read inserted in lieu thereof, which is paragraph 13; did you see the contract after those changes were made?

A. Yes.

Q. You knew then that the contract that was submitted to the Railroad Commission of Texas was in accordance with the suggestion made by me didn't you?

A. With that one additional phrase——

Q. I believe your counsel did add one phrase to it?

A. That is right.

Q. So you discussed that feature of the matter with your lawyer there in Oklahoma City didn't you?

A. Yes.

Q. And your lawyer in Oklahoma City, after consideration of the suggestions set forth in my letter, added one phrase to it, and with that additional General Mills prepared a contract?

A. That's right.

Q. And that contract was submitted to the Railroad Commission of Texas, and it is your understanding, in support of Mr. Steele's application?

Mr. McKnight: We object to what his understanding is as being wholly immaterial, he did not submit it himself.

[fol. 244] Mr. Morgan: It is admitted——

Mr. McKnight (Interrupting): I do not deny that you sent or submitted this contract to the railroad commission of Texas but what this witness's understanding was is wholly immaterial, he did not submit it himself.

The Court: I sustain the objection.

Mr. Morgan: All right.

Q. You know it was prepared for the purpose of submission to the Railroad Commission didn't you?

A. That is correct.

Q. Now, then, Mr. Colfix, did you ever submit to the Railroad Commission of Texas your supplemental contract?

A. We had no occasion to do that, we did not even submit the original.

Q. Mr. Steele submitted the original?

A. Whether he submitted the supplemental I do not know.

Q. All right, did you or any other official of your company ever advise the Railroad Commission that you desired to deviate from or charge a rate different to that promulgated by the Railroad Commission?

Mr. McKnight: We object to that for the reason that there is no obligation on the part of General Mills to make any request upon the railroad commission. It is not a permittee or had any connection.

[fol. 245] The Court: I overrule the objection.

Mr. McKnight: We except.

Mr. Morgan:

Q. Tell the Court and jury whether or not you as an official of General Mills ever made a request to the Railroad Commission of Texas for a change in rates as the general order prescribed to fix rates provides?

A. No, we made no such request.

Q. Did you or any other official of your company, or do you know of any other official of your company who made any such request?

A. I know of no such request.

Q. Now then, is it your testimony, and will you tell this Court and jury that your Company paid Mr. Steele something less than the rates fixed by the Railroad Commission?

Mr. McKnight: If the Court please, we object to that question.

Mr. Morgan: I withdraw the question, it is already admitted.

Mr. McKnight: The admission speaks for itself.

Mr. Morgan:

Q. Now, Mr. Colfix, you changed this supplemental contract later on didn't you, you made a change in it as to the amount you were going to pay Mr. Steele?

A. We adjusted that factor of compensation with Mr. Steele so that the overhead he received instead of being $100.00 was $150.00.

[fol. 246] Q. Did you advise the Railroad Commission of that change?

A. No.

Q. Now then, with reference to the design of your truck about which you testified a while ago, what is the type and design of the truck that Mr. Steele used in the operation of this business?

A. I do not believe I understand the question.

Q. Tell the Court and jury, just what kind of trucks he used, describe the trucks, you have seen them?

A. Yes.

Q. Tell the jury what type they were?

A. They were flat bottom trucks with smooth sides and tarpaulin top, generally speaking.

Q. They were not the van type truck?

A. I am not sure whether he had the van type or not. In some locations we had vans and some with tarpaulin tops, he could have had both. I have seen more of the tarpaulin tops.

Q. By tarpaulin you mean with these big sheets, we used to call them wagon sheets?

A. That goes over the top and down the sides.

Q. They are tied over to prevent dirt or rain or any foreign elements getting in on the products?

A. Yes, sir, that's correct.

Q. Is that the one piece instrument, is, by that I mean, is the engine and cab in one part of the trailer, or is it what you call a bobtail with just one truck?

A. Generally speaking, that is a bobtail, I believe that is the term the truckdrivers use.

Q. Just a bobtail type truck?

A. Yes, sir, that is my understanding.

Q. What make of truck is this?

A. I do not remember the makes of the trucks down there.

Q. You do not remember that?

A. No.

[fol. 247] Q. You do not know whether it was a National or a GMC or a Ford or a Chevrolet or what?

A. There are various makes.

Q. Did you ever have occasion to go on the trailer with these drivers, I mean go on a trip with them?

A. No, sir.

Q. Did you have occasion to go on a trip with Steele over the route?

A. No, sir.

Q. What you know, and what you have testified to a while ago, is what someone else told you about where they went, is it not?

A. In my experience, it is necessary for me to go around the various plants, it has been necessary for me occasionally to be out in the territory inspecting the territory etc., and also the delivery of flour etc. at the other end, but I have never been on a truck from one place to another.

Q. Have you ever been out on these operations during the time Doc Steele's trucks were unloading at any point?

A. I believe I have never seen Doc Steele's truck unload.

Q. Did you ever see them at any time on the highway?

A. Yes.

Q. Where?

A. In Texas around here driving from Wichita Falls to Fort Worth, out into the western part of Texas, yes, I have seen them.

Q. What highways would you think you saw them on?

A. I do not recall.

Q. You do not recall?

A. No.

Q. All right, now then, what type of trucks has Sproles and Tarry and Miller & Miller and Plunkett maintained in Wichita Falls for this same type of service?

A. I do not know.

[fol. 248] Q. You do not know. You do not know whether they have identically the same type of trucks or not?

A. No.

Q. You do not know they are identically of the same make and the same type of truck?

A. No.

Q. So when you told the jury a while ago in response to your lawyer's question, over our objection, that the common carriers did not have the type of truck that you needed, you did not know what type of truck they have do you?

A. It is not necessary, but when I was around these plants I saw these trucks around there. I saw these common carrier trucks and I have some idea as to their structure.

Q. Have you made inquiry of the Sproles Motor Freight lines to determine whether they have this same type of truck?

A. No.

Q. Did you ever make inquiry of Tarry Motor Freight Lines to determine whether it has the same type of truck?

A. No.

Q. Did you ever make any inquiry of Miller & Miller Motor Freight lines to determine whether it had the same type of trucks?

A. No.

Q. You do not know then whether they have the same type of truck or not, that is correct; is it not?

A. Only from my observation, that is correct.

Q. That is all right. Now then, when you saw common carrier trucks, Sproles, Tarry, Miller & Miller haul products for General Mills, from what dock did they load?

A. At Wichita Falls, there is only one dock there which they could load from and that is the dock right out in front of the plant.

[fol. 249] Q. Is that the same dock where Mr. Steele's trucks picked up and loaded?

A. Yes, sir.

Q. Is there any difference in the method of loading Sproles trucks from that of loading Steele's trucks?

A. I say in the case of Mr. Steele's trucks our city sales department there determines the arrangement in which the load will be placed on the truck so it can be loaded; in the case of the Common Carriers, I think they put it on the common carrier, just so they put it on there.

Q. Do you know that or don't know that?

A. I don't know.

Q. You don't know that?

A. No.

Q. Your employees, that is General Mills' employees do the loading in both instances?

A. Yes.

Q. You are—you take the Steele's trucks or your employees, you take your freight from the mill and place it on the trucks?

A. I do not understand the question, what is the question.

Q. Your employees load both common carrier trucks and contract carrier's trucks, they do the loading and the driver of the truck in no instance does the loading?

A. I am not sure that in the common carrier whether the driver did any loading, I know that in our own trucks we do our own loading, and also trucks operated by Mr. Steele, that our employees do the loading.

Q. Now, then, Mr. Colfix, you testified a while ago about your competitive needs, now when you say competitive needs, you are talking about competition with other mills are you not?

A. Other mills and other jobbers of our merchandise.

Q. Is there any other mill in Wichita Falls?

A. No.

[fol. 250] Q. That is the only flour mill there?

A. Yes, that is correct.

Q. You compete with flour mills located in Ft. Worth and other sections?

A. And other parts of Texas.

Q. When you were talking about competitive needs, you were talking about your competition with other milling concerns, competition with wholesalers and jobbers, handling the same or similar products are you?

A. That is correct.

Q. You were not talking about competition of transportation were you?

A. No.

Q. You said a while ago that many customers were not served by common carriers, did I understand that correctly?

A. Yes, that is correct.

Q. Name one?

A. I do not know.

Q. You cannot name one? Are you telling the jury that you testified a while ago in response to your lawyer's questions that there were a number of customers that were served by this contract carrier and now you cannot tell us a single one?

A. That's right.

Q. Mr. Colfix, your lawyers have agreed by stipulation, and it is in the record, so I am speaking from the record, and this question is based upon this record—counsel by stipulation has agreed with us that the compilation made on that schedule of delivery is substantially correct, that is in the stipulation.

Mr. McKnight: The stipulation speaks for itself.

[fol. 251] Mr. Morgan:

Q. Mr. Colfix, do you know that from the instruments which have been admitted as correct, that less than 1% of all of the deliveries made by General Mills—I mean made by the Plaintiff Steele for General Mills is to those stores not otherwise served by common carriers?

A. I do not know that.

Q. You are going to be here a few days during the progress of this trial?

A. I think so.

Q. I will ask you if you will check that and determine that, if I am in error in my calculations, and be in position for you, as a defendant witness, to tell this Court and jury whether or not it is not a fact that not more than one-half of one per cent of all of the deliveries made were to store not otherwise served by common carriers, will you check that for us please?

A. Yes.

Q. All right now, when you said a while ago that your competition required additional service—now let's see as concerns the transportation of the two companies in connection with that point. If you give an order for a truck load of flour to be picked up at the point of origin at Wichita Falls and delivered to a consignee in Ft. Worth, Texas, if you give that to Sproles Motor Freight Lines or if you give it to Steele Distributing Company, they would travel down the same highway wouldn't they?

A. It seems reasonable that they would.

Q. You know as a matter of fact they would?

A. I do not know.

Q. You do not know?

A. No.

Q. For your information, Mr. Colfix, if you are a stranger in this section, the two main arteries of traffic from Ft. Worth to Wichita Falls one is by way of Jacksboro and the other by way of Bowie—Sproles Motor Freight lines is [fol. 252] authorized to go both ways and likewise Steele Distributing Company is authorized to go both ways. Now then in such instances the delivery then by Steele or by Sproles or likewise by the Terry Motor Company or Miller & Miller, would all be transported over identically the same highway that is true is it not?

A. I don't know.

Q. Assuming Mr. Colfix, that Miller & Miller or Sproles Motor Freight Lines would travel by way of Bowie from Wichita Falls, the same route that Mr. Steele would travel in his trucks, one would get here as quickly as the other wouldn't it?

A. If they go at the same speed, yes.

Q. We have the same speed law for both of them?

A. Yes.

Q. If Sproles Motor Freight Lines brought a load of Flour to Ft. Worth to a consignee he would take it and deliver it to what we call store door delivery wouldn't he?

A. I understand that is done.

Q. Likewise, if Sproles or Tarry or any other motor freight line, if they deliver a load of flour to Jacksboro or Bowie or Henrietta, or any other point within this radius of 150 miles, the common carrier would take the freight and deliver it to the store door of the merchant or consignee, you understand that don't you?

A. You are talking about——

Q. (Interrupting:) Common carrier motor freight?

A. You are talking about straight truck loads?

Q. Yes? Or other shipments either?

A. I understand some of those cases, they are delivered at distributing points.

Q. And from the distributing point to the store door?

A. Yes.

Q. In that event the delivery will be made to the store door?

A. On the part of the common carrier, yes.

[fol. 253] Q. The Steele Distributing Company contracted with you to do identically the same thing didn't they?

Mr. McKnight: The contract speaks for itself.

The Court: If he knows it, I think he can testify.

The Witness: That contract does not say about where the merchandise is to be delivered other than to the party designated by our invoice or ticket.

Mr. Morgan:

Q. Steele would haul for you a carload or a broken load either?

A. A truck load.

Q. Truck load, or L-C-L shipment?

A. Yes, sir.

Q. L-C-L Shipments?

A. Most shipments he made were less than carload.

Q. Were they less than truckloads or truck lots?

A. Well, I think generally speaking, the company would arrange to get enough there in a truck so it would have a complete load when it went out, and scattered it around at various points.

Q. That would be delivered at many different stores or consignees over the territory wouldn't it?

A. That is correct.

Q. So the individual shipments were in nearly every instance less than truck load shipments or what you traffic men refer to as L-C-L shipments?

A. I think that is correct.

Q. All right now, then, to illustrate what I am trying to develop, let's say you had a shipment of flour to a number of merchants in Graham, and a shipment of flour to a [fol. 254] number of merchants in Jacksboro and a number of shipments to merchants in Bowie. All right now then, assuming that these truck lines, you say you do not know the routes any of them travel?

A. That is correct.

Q. Just a minute, then, do I understand here, Mr. Colfix, that you do not know the routes traveled by any of the common carriers out of Wichita Falls?

A. No, I do not know.

Q. You do not know what any of them are?

A. No.

Q. Then you are not prepared to tell the Court and jury whether they go identically the same highway that Steele went or not?

A. No.

Q. You do not know where they have an overnight or a few hours between these points, you do not know?

A. That is correct.

Q. Therefore, when you said a while ago that a common carrier did not have equipment to handle wheat on return hauls, that Steele did, you said, you simply did not know whether their equipment was designed for that or not?

A. I was testifying about equipment I have seen.

Q. But you simply do not know whether any of these truck lines did have any equipment sufficient to do that?

A. They did not have the equipment.

Q. You do not know?

A. I have seen the equipment.

Q. You have seen Sproles' equipment?

A. On the highway.

Q. Tell us what is the difference in Sproles' equipment and Steele's equipment?

A. You see these trucks going down the highway and if the end gate is open, you can see a lot in there, bolts and nuts and things of that nature.

[fol. 255] Q. I understand that, but how do you know whether they have the equipment or not?

A. I have never seen them with equipment that we need.

Q. This wheat haul is simply for a period, for a season any way, is it not?

A. Generally speaking the major part of it would be and some of it would be just occasional shipments.

Q. Was the amount that Mr. Steele actually hauled for you of wheat, was it relatively small?

A. It was small.

Q. Now then, you said a while ago that Mr. Steele did not have terminal facilities, such as repair shop and mechanics, did you say that a while ago in response to your lawyer's questions?

A. No, I think he asked me about a place, about a garage.

Q. I am talking about mechanics and repairs?

A. Nothing said about mechanics,—about repairs.

Q. You do understand that common carriers like Miller & Miller, like Tarry, Sproles Motor, you understand they maintain a complete terminal facility where repair service is had in Wichita Falls, don't you?

A. I don't know.

Q. You know the home office of Miller & Miller is located there don't you?

A. Yes.

Q. Don't you know the home office of Tarry is located there?

A. I do not know, where Tarry's office is there or not —that is the home office, I know he has an office there.

Q. The Plunkett Company?

A. I do not know.

Q. You do not know much about them?

A. I know nothing about the location of their home office.

[fol. 256] Q. Do you know whether or not they maintain terminal facilities, a garage and repair shop there?

A. I have seen those, Miller & Miller and Tarry.

Q. You do not know whether they are prepared to keep the trucks up in running order, in better running order than the man who maintains no facilities or not do you, you just do not know about that?

A. I do not know about that point.

Q. Now, Mr. Colfix, your counsel asked you a while ago about the increase in the competitive situation during the past 20 years, do I understand that the competitive situation about which you speak relates to other mills and jobbers in the wholesale business that is, those who are engaged in the same business as that which General Mills is engaged in?

A. That is correct.

Q. So your reference to competition on that score related to problems that you have in competition with other mills, other jobbers and other wholesalers?

A. Yes.

Q. And it has nothing to do with the problem of transportation?

A. Except that transportation is one of the elements of service that we give in competition with our competitors.

Q. Now, then, you further testified a while ago about drivers going in the store and sweeping out and putting a load of flour up in front and keeping it fresh etc., is it not a fact that every driver of the Steele Distributing Company is instructed to take the products and deliver them to the store door and nothing more?

A. No.

Q. You do not know that to be a fact?

A. Never heard of that.

Q. You do not know what they actually do then, do you?

A. The policy of the company—

[fol. 257] Q. (Interrupting.) I am not asking about the policy, I am asking you if you know of your own knowledge what the driver does, when the driver drives up to a grocery store, whether he went in and swept it out or whether he——

A. (Interrupting.) I have never seen it.

Q. You have never seen that?

A. No.

Q. Then you cannot tell the jury whether or not that service was or was not performed can you?

A. Only in so far as I know how the company operates our business.

Q. I am not talking about policy, I am asking from your own knowledge and information, if you know, of your own knowledge, whether any of the drivers during the time we have under consideration who were working for the Steele Distributing Company actually went in the stores and performed any service in addition to that of hauling the products to the consignee?

A. I never did see them do it.

Q. You do not know that that is correct?

A. I would hate to say that because if they would not do it, we would immediately have trouble, so I am sure they must have done it.

Q. Mr. Colfix, what position do you occupy?

A. I am Division Comptroller.

Q. What do you have to do with transportation?

A. During the period that this contract was made, I had the responsibility to supervise all truck operations, which was in turn delegated to a man who is a technical expert in handling them.

Q. So you ought to know the rules and regulations in the states in which you are operating?

A. No.

Q. It is not your duty to know that?

A. No.

[fol. 258] Q. Whose duty is it in the company to know that?

A. Mr. McCraney, at that time.

Q. I will ask you, Mr. Colfix, if you ever heard of these rules and regulations of the Railroad Commission of Texas, on this question—you can see this if you want to consult it?

Mr. McKnight: I would like to see it.

Mr. Morgan: I have not offered it, you can see it.

Mr. McKnight: We object to it if the Court please, to reading the tariff to the witness, as being improper examination I do not think the tariffs should be read to witnesses.

The Court: He has not asked him that.

Mr. Morgan: I asked him, I will ask him first if he is familiar with the rules and regulations of the Railroad Commission tariff 1-A.

A. I am not.

Q. You testified about different requirements your company, on this question of service, on this question of pick up and delivery, under item 600—

Mr. McKnight: (Interrupting.) If counsel is now preparing to read or is reading from the tariff to interrogate the witness, I submit the witness said he was not familiar with it. We submit that is not the proper way to prove up tariff regulations and we object to it.

[fol. 259] The Court: I do not know whether it is within the knowledge of the witness.

Mr. Morgan: We will just offer this class, tariff No. 1-A, that is the part that reads as follows:

Mr. McKnight: (Interrupting.) If the Court please, this is not—

Mr. Morgan: (Interrupting.) This is the official tariff of the Railroad Commission.

Mr. McKnight: It is not a tariff I have had an opportunity to see, and no reference has been made to it in the pleadings and it does not seem to be certified. I don't see the materiality of it and for the present I am going to object to it, for the reason that first, it can have no material and legitimate connection with this witness's cross examination, his having testified he is not familiar with it. Next, because it is not properly proven as a tariff of the Railroad Commission of Texas.

Mr. Christopher: That is the identical tariff referred to in the pleadings wherein we have plead it as the Railroad Commission's Tariff, Tariff 1-A, it is the identical tariff that contains item 470, which makes the rules and regulations, and they have also admitted that it is the identical tariff which fixes in cents per hundred pounds, the rates applicable to common and contract carriers, and which they admitted that computation which we made in this thing is substantially correct. So they know what the tariff is, they have had ample notice of it, they have had ample opportunity to examine it.

[fol. 260] The Court: I overrule the objection.

Mr. McKnight: We make the further objection, if the Court please, that this tariff is not applicable, is not shown to be applicable to this defendant.

The Court: This is a tariff in respect to regulation of delivery.

Mr. McKnight: We make the objection to the rules and regulations that are being offered as a part of the tariff.

The Court: The witness's testimony in connection with his examination, I will admit it.

Mr. Morgan: It is not necessary to copy this voluminous big book, if I may read into the record just one paragraph, I think that will satisfy us.

I am reading from the Railroad Commission of Texas Motor Freight Class and Commodity tariff No. 1-A prepared and issued by the Railroad Commission of Texas, and this section, Item No. 606 for identification, which I shall read:

"Unless otherwise specifically provided herein, the rates named in this tariff cover transportation charges from the sidewalk or dock at origin to the sidewalk or dock at point of destination."

The Court: We will now stand adjourned until 9:30 in the morning.

[fol. 261] Morning Session December 13, 1944.

Mr. Morgan: If your Honor please, and gentlemen of the jury, before we closed yesterday afternoon, the Court had just allowed me to introduce item No. 600 entitled "pick up and delivery" in class commodity tariff No. 1-A of the Railroad Commission of Texas. I will read that one sentence and that is all we introduced:

"Pick up and delivery Item No. 600. Unless otherwise specifically provided herein the rates named in this tariff shall cover transportation charges from the sidewalk or dock at origin to sidewalk or dock at point of destination."

Now, your honor, there have been some minor amendments to that which are immaterial, but if counsel wants them we have no objection to the minor changes being placed in. It does not change this sentence any at all.

Q. Now then, Mr. Colfix, I will ask you if you are familiar with this order that I have just read?

A. No, I am not.

Q. Never heard of that before yesterday afternoon?

A. That is correct.

Q. I believe you testified yesterday on direct examination that you are now in charge of the accounting department, is that correct?

A. That is correct.

Q. Stationed in Oklahoma City?

A. That is correct.

Q. Were you in that capacity at the time this permit was issued to Mr. Steele?

A. Yes.

Q. Have you been in that position constantly since that time?

A. That is correct.

[fol. 262] Q. All right, now then, in that department is it or not your duty to know and be familiar with all transportation taxes that may be imposed upon the carriers that haul for your company?

A. No, we have no occasion to be familiar with that.

Q. You mean you are not even familiar with the Federal Transportation Tax imposed by the Federal Government?

A. I have heard of it.

Q. Don't you know that you, as well as the carrier, are liable and are charged by law to pay that Federal Transportation Tax on all products hauled for General Mills?

A. I have heard of that, yes.

Q. I will ask you if you are familiar with the gross receipts tax imposed by the State of Texas on all shipments made by both shipper and carrier?

A. I have heard reference to that also, as to intimate details on both of those, I have had no experience checking into them, those, generally speaking, are handled by our traffic department.

Q. That would be handled by your traffic department instead of the accounting department?

A. Yes, sir.

Q. If any taxes were paid or check issued or voucher issued, then it would come to you?

A. That is correct, based on their approval.

Q. Now then, I will ask you if you are familiar with the fact that Mr. Cross—you know Mr. Cross, of course?

A. Yes.

Q. He is down here for this hearing?

A. Yes, sir.

Q. You have been with him for two or three days here at Ft. Worth?

A. Yes, sir.

Q. Does he work in the Oklahoma City Office?

A. Yes, sir.

[fol. 263] Q. In what department is he?

A. He is in the traffic department.

Q. Does he handle that department in Oklahoma City now?

A. Yes.

Q. I will ask you if you know of your own knowledge that Mr. Cross went to Austin soon after this operation began concerning a hearing that was held by the Railroad Commission of Texas on a motion relating to the changing of rates of contract carriers?

Mr. McKnight: I object to that question because it involves so many different elements.

The Witness: I know Mr. Cross frequently goes to many rate hearings, he is out of the office on numerous occasions for both Texas and Oklahoma rate hearings and interstate commerce hearings.

Q. Do you know of your own knowledge whether or not he appeared on this particular occasion on behalf of General Mills at this rate order hearing before the Railroad Commission concerning contract carriers?

A. I have heard him discuss and say that he was at such a hearing.

Mr. Morgan: I believe that is all.

Redirect examination.

By Mr. McKnight:

Q. I want to ask you a couple of questions. Mr. Colfix, you heard Mr. Morgan's questions yesterday with respect to whether Mr. Christopher made some suggestions about [fol. 264] submitting the supplemental contract to the Railroad Commission of Texas. I hand you herewith this letter, Exhibit No. 1, from Mr. Morgan, in which is contained a post script about entering into a supplemental contract, is there any suggestion there about submitting it to the Railroad Commission?

Mr. Morgan: That shows for itself. Over our objection it is in the record. We object to his interpretation of the letter.

The Court: The letter speaks for itself.

Mr. McKnight: I know it speaks for itself, but counsel

kept referring to these letters yesterday in connection with this question.

The Court: That was cross examination.

Mr. McKnight:

Q. All right, I will ask you this question, Mr. Colfix, in this conversation you had with Mr. Christopher and Mr. Steele, in the office of Mr. Christopher in Ft. Worth on April 11, 1941, I believe it was, according to the date of this letter, was there any suggestion made by Mr. Christopher at that meeting that this supplemental contract be submitted to the Railroad Commission?

A. No, no such suggestion was made.

Mr. McKnight: That is all.

[fol. 265] Re-cross examination.

By Mr. Morgan:

Q. You are testifying now about a conversation some three years ago?

A. That is correct.

Q. And you know that letter that Mr. Christopher wrote to you was written on the same day, within a few hours or a few minutes after the conversation was had don't you?

A. That is correct.

Mr. McKnight: Is there anything in that letter about submitting the contract to the railroad commission?

Mr. Morgan: I object to that.

The Court: It is not proper to prove from the witness what a letter in evidence shows.

(Witness excused.)

Frank H. Cross, being duly sworn on behalf of the defendant, and examined by Mr. McKnight, testified as follows:

Q. State your name to the Court?

A. Frank H. Cross.

Q. Where do you live?

A. Oklahoma City.

Q. What is your business?

A. I am employed as Division Traffic Manager for General Mills.

[fol. 266] Q. How long have you been in the employ of General Mills?

A. A little more than ten years.

Q. In what capacity have you worked for General Mills?

A. Four years I was traffic manager at Wichita Falls, Texas, between 1934 and 1938, and since that time I have been Traffic Manager and Division Traffic Manager at Oklahoma City.

Q. Was that your first employment with General Mills?

A. Yes. Between 1938 and the present time I have been employed by General Mills at Oklahoma City as Traffic Manager and Division Traffic Manager in charge of transportation. At the present time, rail and truck and water and any other form of transportation.

Q. Has your employment in Oklahoma City in the capacities in which you have stated extended over the supervision of transportation out of the Wichita Falls plant?

A. It was for the past four or five years, as well as the other points in this division.

Q. Wichita Falls is in the division that you have supervision over?

A. Yes, sir.

Q. Now, prior to the time that you went with General Mills, have you been engaged in traffic work for any one else?

A. Yes, sir, I was four years with—four years, preceding my employment with General Mills, I was connected with the Universal Mills in Ft. Worth, from about 1930 to 1934.

Q. Was that in the same capacity, in the Traffic Department?

A. It was in the same work in the Traffic Department, yes, sir. Prior to that time I was associated with the Rock Island Railroad for eleven years.

[fol. 267] Q. For how long?

A. 11 years.

Q. Then you have been engaged in various forms of traffic work for something like 21 years?

A. That's correct.

Q. Are the traffic problems at your Wichita Falls plant any different from your traffic problems at your other plants in this Southwestern District?

A. Generally they are about the same.

Q. About the same?

A. Yes, sir.

Q. What character of business is carried on at your various mills and like the Wichita Falls mill?

A. We are engaged in the manufacture and distribution of flour and meal and meal products, feed and corn meal and securing the raw products for the manufacture of them.

Q. In other words, you procure raw products such as wheat and other grains and move it to your mill at Wichita Falls and process it and then sell and distribute the processed products from the mill?

A. That is correct.

Q. Now, after processing these raw products, into flour and other commodities, what character of transportation problems do you have in the delivery of that flour to the customer to whom you sell it?

A. There are various kinds of transportation means. Our principal commodity I should say the principal amount of our commodity move- of course by railroad carloads, and naturally we are carload shippers. There is a certain percent that must be moved, either moved by our trucks or other special service of trucking, and there is a small percent of it that moves over common carriers.

[fol. 268] Q. What class of commodities moves by railroad in carload lots?

A. Well, practically everything we manufacture, both flour and feeds. Usually there is usually some cereal and corn meal. The carload shipments of course, are principally to the larger buyers or to the more distant points.

Q. Now, the sales that you make or deliveries that you make in less than carload lots, in less than railroad carload lots, how do you classify them, what do you usually call them?

A. Those are either—we term those either less than carload or less than truck load shipments and they are in the way of drop shipments.

Q. They are what you generally refer to as LCL shipments?

A. Yes.

Q. To what area generally do the so called LCL shipments move?

A. Principally to the adjacent territory around our mills. At Wichita Falls, that radius is probably 150 miles. That particular territory is covered more thoroughly than farther out.

Q. Are there any considerable amounts of so called LCL shipments made outside of this 150 mile radius?

A. Very few, there are some.

Q. Have you analyzed the records of the General Mills plant at Wichita Falls for the purpose of determining the various class- of tonnage that moves from the plant in railroad carload lots and in less than railroad carload lots during, say, the 27 months period preceding Mr. Steele's operations, and the 27 months period of his operation?

A. Yes, I have.

Mr. Morgan: We have the same objection that we have urged to that line of testimony offered yesterday, partic- [fol. 269] ularly that it is an attempt to make a collateral attack on the rate order of the Railroad Commission, and for each and all of the reasons we offered to the testimony of Mr. Colfix. If we can have it understood that we have the same objection, we will not interrupt.

Mr. McKnight: It is agreeable with me.

The Court: All right the objection is overruled.

The Witness: Yes, I have prepared such statements and exhibits.

Mr. McKnight:

Q. Get your data there before you and I want to ask you a question, please sir. What is the total amount of tonnage that is moved from your Wichita Falls plant that was moved during the 27 month period preceding August 1, 1941?

A. Carload you want?

Q. The total tonnage.

A. Total tonnage?

Q. Yes, sir?

A. We handled 379,228,293 pounds total shipment from our Wichita Falls mills.

Q. Is that all there is now?

A. That is all of the tonnage by all means of transportation.

Q. That was during the 27 months period preceding the beginning of Mr. Steele's operation?

A. That is correct.

Q. Of that total tonnage that was moved during that period, can you tell us the amount of tonnage that moved in carload lots by railroad shipments?

A. Yes, sir, that amounted to 323,019,526 pounds.

[fol. 270] Q. What percentage is that of the total tonnage?

A. That figures 87.3 per cent of the total tonnage shipped.

Q. Now, can you tell me approximately how much of that total tonnage that went by railroad cars moved outside of the 150 mile radius, can you give me a general estimate of that?

A. Yes, approximately—carload shipments beyond 150 miles?

Q. Yes?

A. Approximately 95%.

Q. Then of the carload shipments by rail only about 5% of those moved within the 150 mile radius of the Wichita Falls mill?

A. That would be my opinion.

Q. Of the remaining tonnage after deducting the railroad carload shipments, the remaining percentage, 12.7 is it not?

A. Something like that, yes, sir.

Q. That is 12.7 percent of the tonnage being that which did not make up carload shipments moved by what we call LCL shipment?

A. That is correct.

Q. What percentage of those LCL shipments were handled by the company in its own trucks within 150 miles radius of Wichita Falls during this same period we are talking about; all of these questions which I mentioned now, until I state otherwise relate to the 27 months period preceding the Steele operations?

A. So I understand.

Mr. Morgan: Which is wholly immaterial, 27 months preceding any operations of this carrier.

The Court: I overrule the objection.

[fol. 271] The Witness: During this period, may I explain that we operated at that time, our own trucks, and we did not try to stay within the 150 mile radius. That is generally true, that with some exceptions, we would move shipments by our own trucks, and a greater distance than 150 miles, and during that period however, we moved 46,676,400 pounds, the exact figure, which was about 98.87 percent of the LCL shipments.

Q. Now, as I understand it, your truck — moved, which you operated yourself and which accounted for something over 98 percent of the total LCL delivery moved primarily

within the 150 mile radius, but on a few occasions went beyond that?

A. Yes, sir.

Q. That is what your report shows, that is when you were operating your own trucks?

A. That's right.

Q. Could you give us any fairly accurate estimate, apart from that moved beyond 150 miles?

A. I would say not to exceed 10% that is not—that is merely my opinion.

Q. You have not checked the records to get that definite percent?

A. No, sir.

Q. But from your familiarity with the business that is your best efforts?

A. Yes.

Q. Now, let's go a little further; after having accounted for your carload shipments, which was 87 percent and better of your total tonnage, and after having accounted for 98 percent and better of the balance, which was classified as your LCL shipments, moving in your own trucks that lacked only a little over one percent of the LCL which moved by either railroad or truck loads, is that right?

A. That is right.

[fol. 272] Q. Have you broken that down for the purpose of showing what part of that one percent plus, moved by rail within 150 mile radius, what percent moved by truck lines within 150 mile radius, and then the same information outside of the 150 mile radius.

A. Yes, I have that information.

Q. All right, give us that?

A. The percentage of the total LCL shipments within the 150-mile radius by rail was .182% and by truck was .552%.

Q. You mean .18 of one per cent?

A. Yes.

Q. And .55 of one percent?

A. That is correct; in other words, it is less than 1% in each instance.

Q. Now, the amount that moved, the amount of LCL shipments that moved by rail beyond the 150 mile radius what would that be?

A. By rail, beyond 150 miles, .11 of 1%.

Q. By truck?

A. By truck, .28 of 1%.

Q. You have got the tonnage also there, haven't you?

A. Yes, I have the total pounds.

Q. Suppose you give us the total pounds in each one of those, first take the 150 miles, take the radius within 150 miles and tell us how many pounds moved by rail LCL?

A. 86,276 pounds.

Q. And by truck?

A. 259,702 pounds.

Q. Beyond 150 mile radius the tonnage moving LCL by rail?

A. 53,861.

Q. And by truck?

A. 132,528 pounds.

[fol. 273] Q. By truck, you mean by truck lines as distinguished from your own trucks?

A. That is true.

Q. You have already given the information about your own trucks?

A. Yes, the total of all shipments moved by common carriers, both within and beyond the 150 miles 1.128 of one percent.

Q. A fraction over one percent?

A. Yes.

Q. Where it breaks down is 1.128, is that it?

A. That is correct.

Q. Now, you have made a comparison have you not of that same transportation during the period of the Steele operation?

A. Yes, sir.

Q. What we call the Steele operations is the period, August 1, 1941 to October 31, 1943, is that correct?

A. That is correct, and totals 27 months.

Q. So these questions which are direct to you now will deal with the facts and figures during that 27 months Steele operation, and I will not repeat that, to save time. During this later period, what was the total tonnage in pounds that moved from your Wichita Falls mill?

A. The total tonnage was 424,919,582 pounds.

Q. What part of that total tonnage moved by railroad cars in carload shipment?

A. The total weight, is that what you want?

Q. Yes?

A. The total weight was 395,870,534 pounds.

Q. What percentage is that of the total tonnage?

A. 93.2 percent.

Q. As compared with 87.3% which moved in the same way during the preceding 27 months period?

A. That is correct.

[fol. 274] Q. I assume that you classified as you did before, all of the other movements except by railroad carload lots as LCL movement?

A. I have; in other words, in comparison with the previous period.

Q. You have used the same formula?

A. Yes.

Q. What was the number of pounds moved by Mr. Steele in his trucks during the latter period?

A. Steele operated and moved 28,584,265 pounds of production, both in and out.

Q. Both coming into the plant and going out of the plant?

A. That is correct.

Q. In other words, he moves some grain into Wichita Falls plant?

A. Yes, sir, he did.

Q. Is that also true of the company trucks in the preceding 27 months?

A. Yes, the same type of operations.

Q. Those grain movements are calculated and included in a comparative statement?

A. Yes, that is right, includes the production handled.

Q. We will get to that grain later, I think you have the percentage of that?

A. Yes, I do.

Q. What percentage of the total LCL shipments, or deliveries, were made in the Steele trucks during the latter part?

A. 98.4 percent of the total LCL movements.

Q. As compared with 98.87 percent moving the same movement in your own trucks?

A. That is correct.

Q. It was practically the same?

A. Practically the same.

Q. Less than 1% variance?

A. Yes.

[fol. 275] Q. Now you have broken down also the remaining 1.6% just like you did the remaining 1.128% of the preceding period, haven't you?

A. Yes, I have.

Q. That means the way all LCL shipments moved after deducting those that were moved by the Steele trucks?

A. That is it.

Q. Only about 1½ percent left?

A. That's right.

Q. How did that 1½% move, first, within the 150 mile limit?

A. By rail, the percentage moved is .7 of 1%——

Q. (Interrupting:) Which was in pounds how much?

A. 2,062 pounds.

Q. And by truck lines?

A. By truck lines within 150 mile radius, 1.019 percent, in pounds, 295,880 pounds.

Q. All right now, I think you made one mistake there reading the figures, if I am not mistaken you said .07 percent you mean you said .7% and you mean .007%?

A. Yes—I did, yes.

Q. Beyond the 150 mile radius, what percent moved by rail and by truck line?

A. By rail, .126%, less than 1%.

Q. And that was how many pounds?

A. 36,772 pounds.

Q. And by truck line?

A. By truck lines, .44%, less than 1%, and pounds, 130,069.

Q. Is there any material difference in the percentage as to the different classes of movements that you have mentioned during the 27 months period preceding the Steele operations, and in the 27 months Steele operation?

A. You are speaking of percentages?

Q. Yes?

A. Very little difference in percentages. The total LCL movement by common carriers in the first instance is a [fol. 276] fraction above 1% and later comparison during Steele's operation was the fraction 1.6%.

Q. Is less than one-half percent?

A. Yes, less than one-half of one percent.

Q. Now, just to summarize that a little further; you made some calculations there and comparisons based on pounds without percentages, haven't you; the statement showing

all shipments moved from Wichita Falls in less than carloads etc.?

A. Yes, I have a statement here.

Q. Let me ask you a question—this statement summarizes the same information, I want to ask you this question, during the 27 months period preceding the Steele Operations, the total tonnage moving by the Railroad Carload lot was how much?

A. In percentage figures?

Q. No, not in percentages, pounds?

A. 323,019,526 pounds.

Q. And the amount that was moved in General Mills' trucks during that same period?

A. 46,676,400 pounds.

Q. Those are what we call LCL?

A. Yes.

Q. Then the number of pounds that were moved LCL by either rail or truck?

A. Total, 532,367 pounds.

Q. During the Steele operation the total number of pounds that was moved by rail in carload lots?

A. 395,870,534 pounds.

Q. And the total pounds that were moved by Mr. Steele under his operations?

A. 28,584,265 pounds.

Q. And by common carriers LCL, both rail, etc.?

A. 464,783 pounds.

Q. Was the operation of Mr. Steele during this 27 months period comparable to the General Mills' truck operations [fol. 277] during the preceding 27 months' period, the same kind—what I mean is was the same class of hauling done?

A. Exactly.

Q. Let me ask you one other question that I overlooked asking you in the beginning. Turn back to the statement you read from there in which you gave us the number of pounds that moved by railroad in carload lots during the Steele operation?

A. I have that.

Q. I believe you said that using a comparable figure for the preceding 27 months' period, you said it was 95% moved outside of the 150 mile radius, did that hold true during the 27 months of Steele's operation?

A. I would say that would be approximately correct.

Q. The percentage would be about the same?

A. Yes, about the same.

Q. Have you broken down the tonnage that was hauled by Mr. Steele for the purpose of determining how much of that was flour and how much of it was various other commodities that he hauled for the company?

A. Yes, I have that information.

Q. What percentage of the total tonnage handled by him during the 27 months period constituted flour that was handled out of the mill at Wichita Falls?

A. Approximately 70%.

Q. That was flour to customers?

A. Yes, sir, that is correct.

Q. Now, also he handled flour that was exchanged by the customer and sent back to the mill?

A. Yes, that was damaged flour he returned to us.

Q. Is that returned damaged flour included in that total tonnage figure you gave a while ago?

A. It is.

Q. What percentage of the total tonnage figures constitutes the damaged flour that was brought back from the customer?

A. 2.74%.

[fol. 278] Q. All right now, I believe you also mentioned a while ago that he transported for you some miscellaneous items like machinery, bags etc.?

A. Occasionally he does that.

Q. Have you made a calculation for the purpose of determining how much of the commodities what percentage of commodities handled by him constituted that class of items?

A. Yes, sir, I have.

Q. What is the percentage of that?

A. That is 5.96% of the total.

Q. Was that handled in or out of Wichita Falls or both ways?

A. Both ways.

Q. Both ways. These percentages are taken in pounds, are they not?

A. Based on pounds, yes, sir.

Q. Based on a pound basis instead of item basis?

A. Yes, sir.

Q. Weight basis?

A. Yes, weight basis.

Q. You also spoke of the fact that he handled grain for you, that is to say he hauled grain in from various points into the Wichita Falls mill?

A. Yes, sir, he did.

Q. Generally speaking, where would that grain come from?

A. That came generally from small elevators, that is wheat produced in the country around Wichita Falls, and there are many small elevators and farmers have some storage on their places, and this grain is trucked in from those points.

Q. Were special trips made for grain or was it picked up on the way back?

A. Both ways.

[fol. 279] Q. Generally speaking how was it picked up, do you know?

A. Generally speaking I imagine most of it was not——

Mr. Christopher: (Interrupting.) We object to that unless he knows, other than the objections already made.

Mr. McKnight:

Q. From the record there, could you give us some estimate about that, if you can, I want that, and if you cannot I wouldn't ask you?

A. Of course, from the records and from the knowledge I have, I would say majority or larger percentage is moved on shipment that he would go for, in other words we have bought, say we buy 3000 bushels, or maybe a 1000 bushels, any amount we could buy, that we bought from these farmers, and from small country elevators and send Steele after it, just like we would use our own trucks to get it.

Q. In other words, your idea is from your knowledge of that business, that more of this was picked up on special trips for it than just picked up on trucks on the way back?

A. Yes, I think most of it would be that way.

Q. What percentage of the total weight or tonnage handled by him constituted grain?

A. A total of 19.689%.

Q. A little less than 20%?

A. Yes.

Q. Of the total tonnage?

A. Yes.

Q. Well, you have also broken down these same classes of commodities for the purpose of showing what percentages of the same classes of commodities were handled and—I beg your pardon I thought it was broken down here but it is not. I was confused here. And the balance [fol. 280] of your figures on this sheet remains by months to the same information that you have given by periods a while ago there?

A. That is correct.

Q. I do not care about that.

Mr. Cross, have you analyzed the various points to which Mr. Steele distributed the products of the company during this 27 months period referred to?

A. Yes, I have.

Q. For the purpose of determining what kind and class of services there were to these various points within a radius served by him, by either truck lines or railroad also?

A. Yes, sir, I have.

Q. All right, now how many different points did he serve and make deliveries to, according to these invoices which you have attached here in this case?

A. Approximately 140 points or destinations.

Q. Of that 140 points that he shows to have served in his invoices, how many, if any, of those points did he have to go to where they did not have any kind of common carrier service either rail or motor? How many with no service at all?

A. There are 12 points that do not have any service whatever.

Q. Either by rail or by common carrier motor connection?

A. That is right, by neither.

Q. All right. Now, how many of those 140 points do not have any direct service either, that is, service by either rail or motor lines?

A. 48 of those points do not have any direct rail or common carrier truck service.

Q. How many of them have truck or motor line service?

A. Well, there are 80 of them that have truck service, I think approximately 11 I believe of those 80, the truck [fol. 281] service is such that it is more an interline service or a joint service for this reason, I think, Wichita Falls

would be located on this railroad, and this destination would be located on some rail line, and it is necessary to go through a transfer or junction point on LCL in order serve them by that line.

Q. So why do you have classified those 11 points as having truck service, the character of truck service is more comparable to the interline than it is truck?

A. That is correct. 42 of this 80 have both rail and common carrier truck service. 24 are served by motor carrier only and 14 by rail only. I mean of both truck and rail eleven of those there actually was indirect service.

Q. In serving these various points, Mr. Cross, that was served by Mr. Steele in this distribution area which you have described, did he or not use the trucks that the company had previously used for making that delivery?

A. Yes, sir, he did. He purchased those trucks.

Q. When?

A. When he started his operations there.

Q. Now, after his operation started, what character of headquarters or office did he maintain to carry on his business?

A. He used our office there at General Mills, and he used our telephone and used our facilities generally, typewriters, adding machines etc., and some of the clerical help, and he carried his records more or less in a brief case, but his office was his portfolio, however he had these things available to him, and was furnished by the company.

Q. Did he maintain any office or establishment or place of business off of the company's premises?

A. Not that I know of.

Q. About his trucks that he used in handling this business, where did he keep those trucks when they were not in service?

[fol. 282] A. They were within our mill property and yards there.

Q. You provided him storage space to place them on?

A. Yes.

Q. During the 27 months that he was handling this distribution service for you, were these trucks devoted exclusively to the hauling of your products?

A. Absolutely.

Q. Did he maintain any docks or stations or depots?

A. He did not.

Q. Did you own docks and stations and depots and provide those facilities to him?

A. That is right, we had our own docks and he was loaded at our docks.

Q. Now, in common carrier operations or truck line operations I might say, which mean the same thing for the purpose of this question. When these truck lines or trucks came to back up for whatever he might handle for you, did they come to your docks in the road trucks or pick up trucks to get the products?

A. By pickup trucks I would say in 99% of the time.

Q. By pickup trucks, what do you mean by that?

A. Usually they assign to that service a smaller unit than the road trucks and of course in most instances it was some truck that had served its time and was not in good shape and they would run them around in town, so if they had a break down they could haul it in, they did not get it out on the road. Usually they were not very serviceable, and in most instances in pretty bad shape as to the bed, and the condition of the equipment itself was pretty well worn, usually a pretty rough and pretty dirty truck.

Q. That is the pick up truck you are talking about?

A. Yes, sir.

Q. The pick up trucks were used to pick up merchandise up at your dock and take it to the warehouse or storage place, or to receive stuff to be transferred to the road trucks [fol. 283] is that the distinction between road trucks and pickup trucks?

A. That is the distinction.

Q. Did Mr. Steele use any pick up trucks in taking your produce from the plant there at Wichita Falls?

A. No.

Q. Did they move the trucks out of your plant into——

A. (Interrupting.) Moved the trucks from our plant to the customer, there wasn't any interchange.

Q. In this so called common carrier truck line operations where they use these pick up trucks or use them to pick up flour or whatever commodities there was at the dock or transfer depot to transfer to their road truck, that necessitated a double handling of the flour didn't it?

A. That's right. Necessitated a double handling right there without consideration of the distribution.

Q. Without consideration of the handling that went on down the line?

A. That is right.

Q. Is flour and similar products susceptible to contamination?

A. Yes, it is very much so.

Q. Suppose you tell the Court and jury something about that and what you have to do to avoid that?

A. Flour is naturally semi-perishable and is very easily damaged. It is packed generally in white cotton sacks, most of the mills pack under a labeled brand of course, and those sacks are easily soiled and the flour is easily contaminated also in shipping, and we use, as I said, primarily, carloads for moving our products and in doing so we can select proper equipment. Our mills are located in each instance at terminals where we have at least three rail facilities, three different rail lines, and of course we ship trucks and we use all of the equipment, but we have first class equipment for this movement and those cars are regularly inspected and classified before they are ever sent to us, and in addition to that they are fumigated and [fol. 284] cleaned either by steam or by fumigation, and hot water, so that the car will be thoroughly in condition to move this product. In moving these shipments we also use a paper lined car, use paper lining in most instances, at least up until we have not been able to get it since the war, we have used paper linings on the floor and on the sides, and usually we cover the product at least if it is family flour.

In making shipments by truck lines we try of course to obtain the same service, that is the same type of equipment to use to move it in. That is pretty difficult to do in some instances, especially where we have small shipments to move by common carrier. As to our own trucks, those trucks are in much better condition than those of the common carriers and in most instances they are constructed differently and have panel sides and hardwood floors and tarpaulins, and they are constantly cleaned and fumigated, and the floors sandpapered and polished, and see that there is no splinters and snags, and the construction of the truck, where we have the bodies built and bolts, you will see bolts protruding that will tear a sack, and we have those bolts countersunk so they will be smooth.

As to common carriers, quite often those trucks are in pretty bad condition, the body of them and the inside of them. They — usually old and scarred and rough, and my experience has been there is not much effort made to clean them up. Of course they get dirty and that tends to damage any commodity, and especially flour that might move to your customer. That flour is going to customer stores and has got to be in proper shape or it will come back to us. For that reason we try to deliver that product to the ultimate consumer in the best condition we can, and it is to our advantage and to our customers' advantage, that is the retail store or jobber, whoever is handling it, or the warehouse, to do that.

Consequently, we are unable to use common carriers where they do not offer services that we can use.

[fol. 285] Q. What about mixed sacks of flour in the same truck with other commodities, or being hauled at the same time by a carrier for other customers, does that create any danger of contamination?

A. A common carrier holds himself out to the public to haul for everybody, and he must do so, and the things that he picks up and the condition of the things that he picks up —he will pick up a piece of machinery or a bunch of pipe or anything else and throw them on his truck, and when you have got flour on there with anything that contaminates, flour picks up odors very quickly, something like sugar, it will absorb an odor of smoke on a truck, even though it is ten feet away. We have had damaged shipments from oil and gasoline, and something like that.

Q. Now, Mr. Cross, how long a time has the company been using its own trucks prior to the time Mr. Steele went into this operation?

Mr. Morgan: We try to be a time saver here and not ramble around on things not material, but we submit that this takes the Court's time and the jury's time, and it is not material to any issue, and is not material to this case, and we respectfully submit that he should stop somewhere.

Mr. McKnight: I think it is very material, that statement as to how long he has been in business, we think that is material.

Mr. Christopher: We suggest that it has no relevancy or is not material to the validity of the rates of the Railroad Commission.

The Court: I do not think so. About how much it weighs or anything else in that relation, is not material here, are [fol. 286] not, as I view it material to this validity of the commission's orders and taking up time. If it is just one question, ask him, but I do not want to be going into any detail about that.

Mr. McKnight: Note an exception to the ruling of the Court. I did not intend to go into detail, but I do not want to violate the Court's ruling. May I ask a question?

The Court: You can ask it.

Mr. McKnight: Answer the question.

A. They used the same trucks, they are using the same trucks and they were using the same trucks when I went with the company in 1934.

The Court: Do you think that affects the question?

Mr. McKnight: I think coupled with the other questions it does. I am sincere I think it does coupled with the questions I asked and with the questions I expect to ask him, I sincerely think that.

The Court: Let's hear the next question?

Mr. McKnight:

Q. Had this constitution problem, I mean this transportation by truck over this trade area which I am referring to, developed and progressed from time to time during the [fol. 287] period the company had been using their trucks?

A. Yes, it had.

Mr. Morgan: I renew the objection.

The Court: I sustain the objection.

Mr. McKnight: Note an exception to the ruling of the Court. In addition to the excluded testimony of the witness I wish to develop from the witness additional testimony along the same line and the witness would testify, if permitted to do so, substantially as follows: That General Mills, Inc. has been using its own trucks for the distribution of its products for about twelve years; that common carriers either rail or motor have never been employed for the distribution of its less than car load shipments except in isolated or emergency cases involving less than 1% of merchandise handled; that the flour business is highly competitive; that the method of distribution of mill products, principally flour, has developed in the trade within

the last ten or twelve years from a mere requirement of transportation to include a distinct service to and direct contact with customers; that competition in the business has brought about the necessity for direct and frequent services to retailers and other large quantity users, such as bakers, instead of bulk sales to wholesalers and jobbers as was formerly the method of doing business; that the present method of frequent and direct services to customers is a universal practice in the business; that witness is familiar with the distribution plans of all of the major milling companies operating in Texas, such as Bewley Mills, Burrus Mills, Universal Mills and Pillsbury Mills; that none of said companies employ common carriers either [fol. 288] rail or motor in the distribution of less than car load shipments of flour to customers; that direct delivery and the services to customers in the care of and in the prevention of damage and contamination to the flour by the use of equipment devoted exclusively to the handling of flour and properly constructed to protect the product, and in the proper handling of the product within the establishment of the customer, and small frequent deliveries as required by customers are all necessary requirements for successful competition in the flour milling business and such service is not offered by or available from any common carrier; that until operations were commenced under the Steele contract such distribution by General Mills, Inc. in Texas had always been accomplished by company owned trucks; that such distribution is now being made by company owned trucks; that the flour for domestic use shipped in railroad car load lots from defendant's mill in Wichita Falls going to areas beyond the reasonable trucking distance, or the one hundred and fifty miles area, is in the main destined for company warehouses at distant points and is there distributed by a specialized delivery service in substantially the same manner as required by the contract with Steele.

The Court: The Court will not permit the testimony of the witness as outlined by Mr. McKnight and an exception will be reserved for the defendant.

Mr. McKnight: To all of which the defendant excepts.

Q. Now, Mr. Cross, how long had Mr. Steele been working for General Mills before the operation started under this contract?

[fol. 289] The Court: Somebody testified to that for quite a while; any way it is well known that he was with them for quite awhile.

Mr. McKnight:

Q. Was he engaged in the transportation and the delivery end of that business?

A. He was.

Q. And before he occupied a similar position to that, in which he worked for some several months at Wichita Falls before this operation actually started?

A. Yes, he did.

Q. Now, I have a contract that has been offered in evidence here by the plaintiff in this suit (Plaintiff's Exhibit No. 1) and in paragraph 1 it says: "The first party, as an independent contractor, hereby agrees to deliver or transport the products tendered for shipment by second party according to its requirements and to such several consignees or places in the State of Texas as second party may designate and to procure, furnish and maintain available at its sole cost and expense, all necessary and proper motor trucks and trailers herein referred to as "Transportation units" sufficient to properly and expeditiously deliver or transport such products according to the requirements of second party."

Now, at the time that contract was entered into, I will ask you whether or not the company had any well defined requirements with respect to the delivery and distribution of this class of merchandise that Mr. Steele proposed to handle?

Mr. Morgan: If your Honor please, we object to that; it calls for an interpretation of the contract and is wholly immaterial and irrelevant.

[fol. 290] The Court: It does not call for any interpretation of the contract; I overrule the objection.

The Witness: Yes, we have a very definite policy as to the distribution, of these products.

Mr. McKnight:

Q. Is that a part of your requirement?

Mr. Christopher: Now, he is asking for a construction of the contract.

Mr. McKnight: The question I asked is whether or not at the time this contract was made with Mr. Steele, if the company had any well defined requirements relating to the delivery and distribution of its products.

A. Absolutely.

Mr. Morgan: We renew the objection.

The Court: I overrule the objection.

Mr. Morgan: We except.

Mr. McKnight:

Q. What were those requirements?

A. We required these trucks or truck drivers to perform a special service——

[fol. 291] Mr. Christopher (Interrupting): He said these truck drivers, I would like to know which ones he is talking about.

The Witness: All of them.

Mr. McKnight:

Q. At the time this contract was made—the contract, if the Court please, says they will make deliveries, according to requirements, and I am asking what these requirements were at this time?

Mr. Christopher: We object to that, the contract speaks for itself.

The Court: I sustain the objection, unless somebody contradicts it.

Mr. McKnight: There is no effort on our part to contradict it.

The Court: I suppose not, and it does not need to be sustained, if it stands unless somebody impeaches it.

Mr. McKnight: The contract uses the term "requirements" and it must be interpreted, as I understand it, according to everyday requirements, and I am merely asking what those requirements were.

The Court: That is something they wrote up between them, whether it is true or not, it does not make any difference, whether it is true or false.

[fol. 292] Mr. McKnight: That is the Court's conclusion of law, I understand, from what you say; if that is the

Court's view of the law, that it is immaterial, of course, if the Court has decided that, the Court understands I do not wish to go counter to the Court's ruling, I merely reserve an exception, but I do wish to show, if I might, all of these various elements, and requirements that would be in effect and that were in effect and in vogue at the time the contract was made, and which Mr. Steele, as I construe the contract, was required to observe. Now, I offer to do that by this witness, and I understand the Court has sustained the objection to the question.

The Court: No use going into detail about those requirements. That contract shows. I want to get through with this case.

Mr. McKnight: I apologize to the Court for taking so much time, but I feel like it is necessary that I do so. I am sincere in my statement to the Court.

Now, do I understand the Court's ruling is that the witness cannot state the requirements?

The Court: He cannot. No, he cannot state the requirements.

Mr. Morgan: What contract are you looking at?

Mr. McKnight: I am referring to the contract, Plaintiff's Exhibit No. 1, that you offered in evidence.

May I state the purpose of this testimony.

[fol. 293] The Court: Yes.

Mr. Morgan: We ask that that be done outside of the presence of the jury.

The Court: I do not think it makes any difference, go ahead.

Mr. McKnight: The purpose of this testimony, your Honor is to show that no competition existed between Mr. Steele and common carriers, and that the service that he contracted to perform is not substantially the same services as that performed by common carriers. We propose to show what these requirements were that he obligated himself to comply with, and then show that those requirements were such as a character of service that he necessarily must perform, and was not the character of service performed by common carriers and not the character of service available to common carriers, and therefore no competition existed between the parties and that such service was not similar.

The Court: No competition existed between the parties?

Mr. McKnight: Between Mr. Steele and the common carriers.

The Court: I think I have allowed plenty of latitude to show that from your viewpoint, in allowing this total tonnage and the percentage, and I do not want to go into it any more.

[fol. 294] Mr. McKnight: The witness would further testify in response to the question asked, if permitted to do so by the Court, in substance that the transportation and delivery requirements of General Mills, Inc. with respect to the class of deliveries handled by Steele under the contract were in substance as follows: The transportation of products in special type equipment devoted exclusively to the food products in order to prevent contamination and suitable for the handling of bulk grain; delivery over irregular routes and upon an irregular schedule; additional service rendered customers in that the product, instead of being unloaded at door or dock, must be placed inside the place of business of the customer and at a place indicated by the customer; merchandise must be placed in a clean place, properly arranged, so that the old merchandise was moved to the top or front for first sale; extra care must be taken to prevent soilage of sacks or containers and to prevent tearing of containers; truck drivers handled complaints of customers, made collections, picked up soiled or damaged merchandise for return and, in fact, acted as contact men between the Company and the customer; the distribution system required flexibility in that consignments of products might be changed en route in order to meet emergency requirements of customers; required deliveries at stores, bakeries and other merchandise establishments, whether on or off routes of common carriers, and required as little handling of products as possible; required that products, particularly flour, not be loaded in trucks containing other merchandise. The witness would further have testified, had he been permitted to do so, that these requirements were well known and that they were of such a nature as not obtainable from common carriers and that common carriers were not equipped or permitted to furnish the kind and character of service included within these requirements. The defendant reserves an exception to the ruling of the Court in refusing it the

[fol. 295] right to offer into evidence the testimony of the witness as indicated.

The Court: We will take a ten minutes recess.

(After recess.).

Mr. McKnight:

Q. You testified that approximately 70% of the commodities handled by Mr. Steele was flour?

A. Yes, sir.

Q. What character of containers was that flour in at the time it was moved by Mr. Steele?

A. Principally in bags, sacks.

Q. What kind of bags?

A. Cotton bags.

Q. What color?

A. White.

Q. Were they the bags that had "General Mills" insignia or trade mark on them?

A. They had that, and in addition, they had the brand or trade name that appears on the label.

Q. It is packed and shipped in the same bags that it is delivered to the customer in?

A. That's right.

Q. That is true?

A. Yes. There were some exceptions, feed mills——

Q. (Interruption.) I am talking about flour?

A. Flour; there are some shipments we move, especially smaller size bags that move in our what we call outside containers and pasteboard boxes, however that is a more recent method, a more recent method of packing.

Q. In a majority of instances or in most instances during this period, as a rule, have been regular or cotton or white bags that were delivered to customers?

A. That's right?

[fol. 296] Q. Was not packed in any box or anything like that?

A. No.

Q. In the supplemental contract that has been offered in evidence, defendant's Exhibit No. 8, there is contained a provision that the second party, which is General Mills, assumes and carries the risk of any injury of damage to the cargoes transported under the terms of this contract; you are familiar with that provision?

A. Yes.

Q. In common carrier operations where the product is moved by a common carrier, either by truck or rail, does the common carrier or General Mills assume the responsibility for injury and damage to the cargo en route?

A. The carrier in all instances.

Q. And your agreement with Mr. Steele, under that agreement with him, you assume that responsibility?

A. We did.

Mr. McKnight: That is all.

Cross-examination.

By Mr. Morgan:

Q. Mr. Cross, are you acquainted with common carrier truck lines that do business in and out of Wichita Falls?

A. Generally, I am.

Q. Do you know the Sproles Motor Freight Line that operates in and out of there?

A. Yes.

Q. And they have a terminal there?

A. Yes.

Q. And the office of Miller & Miller Truck Line?

A. I know they are located there.

Q. You know that is the home office of the Tarry Truck Lines?

A. Yes, sir.

[fol. 297] Q. That is the home office of Plunkett Truck Line?

A. I know they operate out of there.

Q. They maintain a terminal there, maintain terminal facilities there?

A. I presume so, I cannot say that as a fact.

Q. How much time did you spend at Wichita Falls?

A. That depends largely on conditions, and if there is any difficulty there, I have to make regular trips in there or try to on the supervising and making contacts.

Q. Your testimony here has been from your records has it not?

A. I believe these figures, you mean?

Q. That is true?

A. That is quite true, from the records principally.

Q. All right, now then, I will ask you if you know of

your own knowledge whether these various truck lines, those I have named and any others doing business up there, whether or not they have the same type of equipment that is used by Mr. Steele?

A. Are you speaking of pick ups?

Q. No, I am speaking of equipment that they use trucks that they actually operate over the road, the road trucks, as you refer to them, I will ask you if you don't know that it is a fact that Sproles and Miller & Miller and Tarry and others have identically the same type of trucks as Steele uses?

A. When you say type, you cover a pretty wide condition, it is true that you speak of International or White trucks.

Q. With the same body design?

A. Not identically, in some instances, of course that is not quite true—they have the bobtail and the trailers, they are pretty standard, although we have special bodies built.

[fol. 298] Q. These particular types of trucks, whether GMC or Chevrolet or Fords or Doc Steele's trucks——

A. When his operations were discontinued he had I believe three White trucks and one Dodge truck and one International, if my memory is correct.

Q. All right, don't you know that truck lines that I have named to you have the same make of trucks and of the same design as Mr. Steele's trucks?

A. Those trucks operated by common carriers, when you say same make, that is about all you have to choose from, those makes I have named, but when it comes to a difference in the truck and maintenance of the truck, you are getting into a different situation.

Q. You are talking about the difference—I am talking about body design of the trucks, that is those that have tarpaulins over the top, and those that have tops on them etc., aren't they the same type?

A. Pretty often the common carrier stock bodies are used.

Q. I am asking you this one simple question, do you know whether or not these carriers that I have named out of Wichita Falls have that same type of body, same body type as used by Mr. Steele?

A. As far as I can answer, I think they may be made by the same companies. There is a difference in some of

the construction of the bodies as compared with our trucks. I have reference in connection with our trucks of the special precautions we go to.

Q. I am not asking you that, I am asking if you know, please——

Mr. McKnight: (Interrupting.) I object to counsel saying in substance that it is not responsive. He asked him the difference and he is undertaking to state what it is, and I submit that it is responsive.

[fol. 299] The Court:

Q. Go ahead with your question.

Mr. Morgan:

Q. Do you know whether or not these trucking companies have the same types of equipment as Mr. Steele?

The Court: If you know from personal knowledge of all of the trucks about which he is asking you which may be owned and operated by these various companies, your personal knowledge is what they want.

The Witness: Judge, I would say this, that these common carriers when you speak of comparing equipment, you cannot just say——

Q. (Interrupting.) Now you are speaking generally there—common carriers, that means all of them, but he is asking you of your personal knowledge as to a comparison of these trucks used by these companies and the Plaintiff's trucks?

A. There is a difference, as I tried to state here, there is a difference in the make up, some may be Internationals, some White or something else, but they are basically the same——

Mr. Morgan: (Interrupting.) I am not asking about a comparison. Do you understand the question—did I understand you to say they are basically the same?

A. They are made up the same.

Q. And basically the same thing?

A. Basically you can say they were the same, in that they were constructed similarly, same makes and company, [fol. 300] the bodies may be different, both inside and outside in the construction.

Q. Now then, Mr. Cross, is it not a fact that these trucking companies have solicitors that are calling on you daily every day trying to get your business to haul?

A. There are some calls, yes, they do not call daily.

Q. Those calls are frequent aren't they?

A. Not too frequent.

Q. I do not mean maybe last month or every few months, but these trucking companies are constantly soliciting your business aren't they?

A. They contact us at irregular intervals, yes.

Q. Now, Mr. Cross, you said a while ago—you gave the percentage, you gave the common carrier truck lines and you gave Mr. Steele during the period under consideration, the percentages, now assume for the purpose of this question that the trucking companies do have the same type and design of equipment, can you tell his Honor and this Jury why a truck line could not have hauled all of the tonnage that Mr. Steele hauled?

A. They could not even touch it.

Q. Couldn't have touched it?

A. No.

Q. If they had the same equipment and same trucks?

A. In the first place they don't have operating routes they are set on a certain schedule and leave at certain times and go over a certain highway and make certain towns, usually prescribed by the commission. Even though you assume they had proper equipment, which they do not have, they do not give the service, and this is a specialized service and it is a part of the sales and advertising, it is all correlated and tied in together.

Q. Let me ask you this: You said a while ago that 140 points or towns were served, and you said 12 of those were not served by common carriers?

A. I believe that is correct.

[fol. 301] Q. Name those 12?

A. Bluegrove, Texas——

Q. (Interrupting.) How many stores?

A. I do not know. Buffalow Springs, Texas.

Q. How many stores there?

A. I cannot answer that. Charlie, Texas.

Q. How many stores there?

A. I don't know. Elbert, Texas.

Q. All right, how many stores there?

A. I don't know. Gilliland.
Q. Do you know anything about that town?
A. No, I don't know. Jermyn, Texas.
Q. Do you know how many stores are there?
A. No. Lusk.
Q. Do you know anything about that?
A. No. Megargle, Texas.
Q. Do you know anything about that?
A. No. Vashti, Texas.
Q. You don't know anything about that?
A. No. Paradise Valley.
Q. Have you ever been there?
A. No. Pumpkin.
Q. Do you know anything about that?
A. No. Thornberry.
Q. Do you know anything about that?
A. No.
Q. Can you tell us what percentage of the total tonnage moved by Doc Steele went to those 12 places?
A. No, I do not know, I do not have those figures.
Q. You do not have those percentages?
A. No, sir.
Q. Mr. Cross, according to a stipulation that is in the record here, it has been stipulated there is less than 1% of the total tonnage there, that that is less than 1% of the total tonnage, do you think that is substantially correct?
A. 1% to these 12 points?
Q. Yes?

[fol. 302] Mr. McKnight: I do not remember any such stipulation.

The Court: I haven't heard of that.

Mr. Morgan: They stipulated that this schedule prepared is correct.

The Court: They have not stipulated that your figures are correct.

Mr. Morgan: I think they did.

Mr. McKnight: I haven't any disposition to say that those figures show one percent or a half percent or ten percent, I don't know. We never did stipulate about any percent.

The Court: I do not think the stipulation goes that far.

Mr. Morgan:

Q. Your position is that you simply don't know?

A. I can't answer that.

Q. And you do know about the other place, most of the other places, and places to which shipments were made, don't you?

A. Do I know what?

Q. I will ask you this question. Is it not true that most of your flour shipments went to Ft. Worth, Dallas and Ft. Worth?

A. You mean carloads or less than carloads?

Q. Truckloads?

A. No, I don't think so.

[fol. 303] Q. Do you know where they did go?

A. They were scattered throughout this radius of 150 miles.

Q. I understand, but can you give us any percentage —you had all of these other percentages broken down, but can you give us any percentages of the total tonnage there, can you tell us how much any of these percentages of the total tonnage moved to any of those?

A. No, I do not know, I do not have them broken down.

Q. Now, Mr. Cross, where did you obtain your information that there was no other carriers serving these 12 towns?

A. From the Fisher publication of the tariffs of the carriers and other sources of information.

Q. You did not find out then that this town of Jermyn —that Sproles or Miller & Miller both serve that did you?

A. No, the records indicate they do not.

Q. You are going strictly by the records, you do not know whether they served it or not of your own knowledge, do you?

A. The records of carriers were used for that, and do not show they served Jermyn.

Q. What period?

A. During Mr. Steele's operation.

Q. How about Megargle?

A. That is equally true there.

Q. Do you happen to know where the town of Jermyn and the town of Megargle is located with reference to the city of Wichita Falls? And with reference to Jacksboro?

A. I know generally where they are.

Q. Don't you know that both of those towns are on the main highway between Ft. Worth and Wichita Falls by way of Jacksboro?

A. As I have said, I am going by the carrier's report or records.

[fol. 304] The Court: That is not correct.

Mr. Morgan: Aren't they on that highway?

The Court: No.

Mr. Morgan: That goes of- towards Semour?

The Court: Yes.

Mr. Morgan:

Q. I will ask you if you know of any road that bears off from Jacksboro a little ways, I believe you call it the middlebuster, between Seymour—I will ask you if you don't know independent of these reports both Miller & Miller and Sproles and Plunkett go over that highway and serve those towns?

A. I do not believe I follow you there.

Q. These two little town-, Jermyn and Mergargle, after you get out of Jacksboro a short distance the road turns to the left and goes towards Seymour?

A. I have seen that road.

Q. You have been over that?

A. I do not believe I have been over it, I have noticed it coming to and from Ft. Worth.

Q. I will ask you if you don't know that it is a fact that Miller & Miller and Sproles both serve and travel over that highway and serve the intermediate points on that highway, including these two towns?

A. I have their schedules.

Q. And Plunkett likewise over the same highway?

A. I have their schedules too, and that can be determined from that.

[fol. 305] Q. All right, now, then, what I am trying to determine, Mr. Cross, is that you are not testifying from your own knowledge other than what you have found in some books and records, that is correct, is it not?

A. These records were compiled with the help of our local traffic manager at Wichita Falls, who is pretty generally familiar with this territory and who as a matter of fact is operating trucks there now.

Q. Did you personally make up the records which you testified to in response to your lawyer's questions?

A. I helped make it, they were made under my direction.

Q. Now then, you said a while ago that these grain hauls were from mills and elevators, and from farmers, could you tell me the name of a single farmer from whom grain was hauled?

A. Right off, I could not. I did not buy the grain, I do not do the buying of the grain, that is handled through our grain department, and we seek to transport it.

Q. Mr. Cross, as a matter of fact, you simply don't know of any farmer from whom the grain was bought?

A. Not specifically.

Q. So when you told his Honor and the jury a while ago that shipments were made from purchases from farmers, you did not have anyone specifically in mind, nor do you know any specific shipments?

A. I know that we did that, and that is about the extent of my knowledge.

Q. You know that is your general policy?

A. Yes, that is right.

Q. You do not know—then your testimony is on your general policy and not any specific instance in this case?

A. Yes, not specifically as to some individual farmer, I could not say.

Q. Are you the same Mr. Cross that went to Austin when the Railroad Commission of Texas was having a [fol. 306] hearing concerning the reduction of contract carrier rates?

A. I was in Austin, I forget when it was, of course I am down there quite often, but you are referring I presume to an oral argument conducted before the Commission.

Q. Before the Commission?

A. Yes, before the commission. I was at that meeting on request of your gentlemen.

Q. On request of Mr. Christopher?

A. I think it was, I think either you or Mr. Christopher insisted that I come down, that you had several clients and that you were trying to establish some kind of a rate, and you thought my appearance there would be beneficial to you.

Q. That is right, and you understood that the Railroad Commission was then, and had been for some time conducting hearings concerning whether they should issue an order reducing the rate to be charged by contract carriers generally over this state, and that applied to Doc Steele and all of the other contract carriers?

Mr. McKnight: I object to that question of whether or not it applied to Doc Steele and all of the other contract carriers. That is a conclusion and is hearsay and whatever hearing was had a couple of years later after this, or a year later, whatever it was is immaterial and irrelevant and has no bearing upon this case. Now, if it is relevant, or if it is material, it would be not for the understanding of some witness.

Mr. Morgan: On that occasion, you did make the statement to the Commission concerning your company's position on the proposed rate order, did you?

[fol. 307] A. No, I did not make any statement, Mr. Morgan; I was not familiar with what they were trying to do other than something involved about truck rates, and I merely entered an appearance which I found out later was not even considered, because it was simply an oral argument, and I made an appearance. We quite often do that, and that is the general practice. I attend many of the hearings, before the Interstate Commerce Commission and the state regulatory bodies, and that is a part of my duties to watch these rates, especially so with reference to grain products and corn and cereals that we are interested in, try to keep up with them.

Mr. Morgan: I think that is all.

Redirect examination.

By Mr. McKnight:

Q. One other question. You were asked a question by Mr. Morgan a while ago, Mr. Cross, if common carriers did not call on you and solicit business at Wichita Falls; I will ask you whether or not Mr. Steele in the conduct of his business was required to maintain solicitors to go around to the general public and solicit business?

Mr. Morgan: I object to that.

The Court: It has already been shown.

The Witness: Mr. Steele had a full truck load—Steele was in a unique position, he had business at all times, he had full truck loads and no solicitation expense and no terminal expense, and no advertising expense and no office expense. [fol. 308] Mr. Morgan: I object to that.

The Court: Answer the question and don't volunteer.

Mr. Morgan:

Q. Mr. Steele always had a truckload when he would leave there?

A. Yes. As far as I know always loaded, wasn't always loaded, but this is the way it would happen——

Q. (Interrupting.) When he left your mill, regardless of the assignee or how many consignees, he would leave your mill loaded?

A. As far as I know he did, in other words we either got something for him or he would get something, or we would get it for him if it was possible to do so, and especially was that true under the ODT, as you know they required that.

Mr. McKnight:

Q. It didn't make any difference as to his compensation, whether he was loaded or not?

A. No. He was paid to go out anyhow.

(Witness excused.)

Mr. McKnight: I would like to make a statement to the Court. If your Honor please, I do not care anything about doing it in the presence of the jury though, I do not have any objection however. I want to tell the Court in a general way the character of evidence that we propose to offer, and possibly by reason of the ruling of the Court, the rulings that the Court has already made, it may shorten the case and obviate bringing witnesses here and interrogating them. I think it might tend to shorten the trial if [fol. 309] I make a statement about this either with or without the presence of the jury.

The Court: The jury will be excused until 1:45.

(The jury left the Court room.)

The Court: All right.

Mr. McKnight: We have several witnesses present, your honor, and available that we expect to put on, by whom we

propose to prove the requirements of the General Mills, Inc., in the delivery and goods distribution of its products from its Wichita Falls mill, and that such delivery and distribution is general in the mill business in this section, and that the requirements——

The Court: (Interrupting.) Specify some of the requirements.

Mr. McKnight: All right, we expect to prove by these witnesses generally, and I will not attempt to name each one of them and what each one of them would testify to, but I can do that if it becomes necessary—the fact that due to competitive and business conditions in the flour and milling industry, there have been developed over a period of years the necessity to furnish as direct and as efficient service as possible from the mill to the customer. That over a period of time it has developed that the mills, in using this transportation service, have found it more desirable and more satisfactory to use their own trucks in making these deliveries and performing this transportation service than either the motor trucks or railroads. I refer to the [fol. 310] class of customers and deliveries that were made within this area.

The Court: I think you have established that.

Mr. McKnight: I think so, but we have some more on that subject. We expect to show also by these witnesses that the various details to a certain extent of the service necessary—one fact that it requires a truck which is constantly under the care and supervision of the Company, and the same thing is true of Mr. Steele's general operation, and we expect to show it is exactly the same thing as company operation, that it is required to be free from contamination, that it requires smooth trucks where the flour cleanly can be laid in without damage, and that it can move as quickly as possible and without any delay and things of that sort. That when it gets to the point of destination that the requirements are that a delivery driver furnish various kinds of service to the customer; that he take the flour out of the truck there and he takes it in to the customer's premises, and that he performs certain services, in exchanging of any bad flour and picks it up and takes it back, and that he takes whatever complaint the customer has, and either directly phones them in, if they are important enough, or else gives them to the manager of the plant at Wichita Falls when he returns. That it is essential

in order to keep direct contact between the mill and the customer that these services be performed. Those are typical of that. There are perhaps other incidental ones that I have not stated.

The Court: Are you going to introduce any evidence to contradict that?

[fol. 311] Mr. Morgan: I do not know whether we will or not——

The Court: All of that is already in evidence.

Mr. Morgan: —I do not think so, because I do not think it is material, and do not think it bears on the case.

The Court: These that he mentioned, as far as I recall, are in evidence. You have a right to put on any witness if you want to. The Court possibly could limit you to two or three witnesses or so many witnesses.

Mr. McKnight: The reason I made this statement is this, that this morning when Mr. Cross was on the stand, I pointed out to him that a certain provision in the contract with Mr. Steele provided that he should transport and deliver these goods according to the company's requirements, and I asked him what those requirements were, and these requirements include these various elements which I have named. Now, I was going to pursue the same line of examination with the other witnesses and the Court sustained the objection to that, and I do not want to take up the time of bringing witnesses here when the Court has already ruled on that question.

The Court: The principal ground was that the information from the witnesses, including this witness, especially this witness, that has just left that he has covered it more fully the requirements, than anybody.

Mr. McKnight: You have had it on cross-examination.

[fol. 312] The Court: I would not hold that you could not put on any other witnesses, but as counsel says, if they are not going to make any issue as to the requirements of the contract carrier over the common carrier——

Mr. McKnight: (Interrupting.) It is almost obvious, without the witness testifying to it. I agree with the Court there. And in view of counsel's statements that he made, I just do not want to do anything that might be contrary or be conflicting with the rulings of the Court, but I do not exactly understand that you made such rulings, but I think

I do now, but I didn't understand it this morning, but I think I do now. We will discuss the matter during the noon hour among ourselves and see if in the state of the record we can discontinue.

The Court: We will adjourn until 1:45 and you can see if you want to introduce additional witnesses.

Afternoon Session December 13, 1944

Mr. McKnight: If the Court please, we wish to offer in evidence, a part of the testimony given by the Plaintiff Steele in a hearing before the Railroad Commission of Texas, on May 2, 1941.

I wish to read from a transcript that is certified to by the Secretary of the Railroad Commission of Texas as being a part of the permanent records of the Commission, and also certified to as being a correct copy of the transcript, by H. D. Mahaffey, Chief Reporter, Motor Transportation Division, Railroad Commission of Texas; this testimony was given in connection with Mr. Steele's application for a permit to transport goods for General Mills.

[fol. 313] Mr. Morgan: We want to object to it for all of the reasons known to the books. That is not admissible on any theory for any purpose bearing on anything on this lawsuit. It is under different conditions for a different purpose and certainly they cannot bring that in here. It was before a different tribunal and they cannot bring that in here; it is irrelevant and foreign. The record already discloses his application was made and that is not admissible on anything.

The Court: I would have to read it to see.

Mr. McKnight: Beginning on page 21 (after the Court had examined the testimony) and it seems that there are two pages marked No. 26; one really should be No. 27.

The Court: I have been permitting a certain line of testimony to be introduced and I think this would also be admissible and I overrule the objection.

Mr. Morgan: We except.

LEO H. STEELE, after being duly sworn, was examined and testified before the Railroad Commission on May 2, 1941, in part as follows:

Mr. McKnight: I now offer from the transcript of Mr. Steele's testimony before the Railroad Commission beginning at "A" on page 21, and will continue to read to the place marked "A" on the second page 26. As I have stated there are two pages 26. This is from the examination by Mr. Christopher.

[fol. 314] Q. Mr. Steele, from your experience, did you find whether or not you have either direct rail service or direct truck service that ordinarily you can get, that is, from the points of shipment to destination that ordinarily you can get pretty good service there?

A. Here is the only thing that we have got to watch in shipping flour in LCL because of contamination. In other words, we can't very easily permit a common carrier especially motor truck lines to take our merchandise because of the fact that he has got kerosene and soap and other stuff that he carries along with it.

Q. Isn't that a condition that you actually find to exist, now, Mr. Steele?

A. Yes, sir. We ship very few small packages, in other words, we do ship a small amount of piece goods, approximately all of them because in the case of cereals, but where you take flour, we get the sacks torn and damaged, we caution the man that comes out to pick it up to wrap this flour up with paper, how long that stays with the paper around it, we don't know; in other words, we try to, try to protect it, that is an extreme emergency, unless in extreme emergency, a case of 298 sacks of flour where we have to go get common carrier service, you see, those kind of shipments, but, as I say, we caution them to try to keep this flour clean and free from soil.

Q. And contamination?

A. Yes, sir. In other words, it is bad to ship flour LCL.

Q. Do you actually, are you able actually on account of that condition to ship flour very much in small shipments that way by the use of the ordinary common carriers?

A. We abstain from it to a great extent, in other words, I don't know of a shipment since I have been there at the Wichita Falls mill, that we have shipped in small sizes; in other words, here is the thing, if you have got 300 three

pound bags, they would have to be baled up and the sacks [fol. 315] put in a container in order to keep from soiling that, that would cost either the company or the customer, so those kind of shipments don't move by common carrier, their trucks and equipment are not made to handle that kind of stuff.

Q. I take it from what you say there, that you have been saying this applies principally to trucks, is that right, to truck lines.

A. Yes, sir, and the same thing would apply to LCL shipments in railroad cars. They ship kerosene and anything else and flour would go right in too.

Q. That is the smaller shipments are LCL shipments either by rail or truck, and a one line haul that we have been talking about?

A. Yes, sir.

Q. Now, suppose that we were on that one line or direct haul what condition have you found with reference to the actual delivery time, are you able to get pretty good delivery; tell us what that situation is?

A. Here is the thing, naturally the smaller stores, as well as the larger stores today, expect a service that we are rendering in taking care of his flour stock, it is to our interest to do that, and in reaching points of destination by common carrier, they don't go in and sweep out every store.

Q. Let's not go into that, it's not transportation service; but let's confine ourselves right now, to whether or not you are able to get proper delivery service at the time that it is required where you have a direct one line haul from the plant to points of destination. Do you get satisfactory service from that, or do you not?

A. As a usual thing, I would say not.

Q. Why?

A. Because of the schedules in which they run their trucks; in other words, we have got to wait and have them pick it up and it is the next day delivery; in other words, we depend on the bulk of business to move that way. Our [fol. 316] emergency shipments can move occasionally by common carrier, and it would be satisfactory where we have got one line hauls but getting to a double line haul, it is pitiful, sometimes it's four o'clock in the afternoon and the baker may be setting in his store at ten o'clock in the morning and he needs it right then.

Q. Let's take the truck line situation out of Amarillo and out of Wichita Falls, where a shipment does involve a two line haul or maybe more than a two line haul, what conditions have you actually found?

A. ——

By Mr. Smith (Interposing):

Q. That wouldn't happen in this 150 mile radius would it, very frequently?

A. Yes, sir, it would, Mr. Smith. I would say it would if we depend on moving all of our merchandise because of the territory routes, in which we have got to effect delivery. In other words, we go sometimes in a circle, and come back which would be the shortest way around.

By Mr. Christopher:

Q. That is the way you do with your own trucks; what he wanted to know is whether or not there would be very many cases where there would be a two line haul involved within that 150 mile radius?

A. If we are serving our customer that possibly wouldn't be true with our LCL small items, but if we are going in the direction which our salesman is taking in flour and trying to get it out by common carrier rather than by our own truck, I would say you would run into a good many two line hauls.

Q. Do you know of your own knowledge now, when you go beyond this 150 miles radius, whether or not you run into a lot of cases where it involves a two or even a three line haul or whether you are able to get a one line haul between that 150 mile radius?

[fol. 317] A. As a usual thing, the greater, on the outside of this 150 mile radius, I would say, depending largely on where that emergency might arise.

Q. And where your shipments might be going?

A. Yes, sir; the destination of your shipments in a good many cases, it would be a two line—I mean two line haul or possibly three, that emergency may arise everywhere in the state of Texas.

Q. What condition did you actually find where there is as much as a two line haul involved which would affect the conduct of your business or the adequacy of the service of these common carriers?

A. We find in most cases, if it is a two line haul, that it would delay the man too much and that it wouldn't be satisfactory service; in other words, you know, it is a two line haul, and it may be four hours before it connects with the other haul, and throw it in there too late.

Q. You say it may be, do you know whether or not that frequently does occur?

A. It frequently does occur.

Q. There is a considerable delay?

A. Yes, sir, in two line hauls, definitely so.

Mr. Smith: We object to that for the reason that testimony is here that the only experience he has had in shipping by common carriers is very small shipments and hasn't shown that it would be the same kind of shipments that he will haul outside of [illegible] outside of this 150 mile radius.

By Mr. Christopher:

Q. As a matter of fact, do you know how those shipments outside of this 150 mile radius runs?

A. I would say, as a usual thing they run in pretty large quantities.

[fol. 318] Mr. Soule: Objection overruled.

Mr. Smith: Note our exception.

A. It would depend, in other words, 25 or 50 barrels.

By Mr. Christopher:

Q. How much would 25 or 50 barrels be?

A. From five to ten thousand pounds, it depends on what the nature of the emergency would be which would arise and whether our equipment could handle it or not.

Q. Would you say that there would be very many cases where it would be as much as a full truck load, 20,000 pounds we will say?

A. We never have had the 20,000 pound law, but I say it would be far and few between if we made that, you would make a half carload area.

Q. The principal operation would be as you have described it?

A. Yes, sir.

Q. Going back, let's confine ourselves, say, to common carriers truck line operations, where there is as much as

a two line haul involved; you find the same conditions existing there with reference to the further possibility of contamination or injury or damage?

A. Even more so.

Q. Why?

A. Because a sack can be torn or soiled that would be more prevailing than it would on single lines.

Q. What would that situation be as to the rail handling small LCL?

A. It would be the same thing. Soiled sacks, that is what we have got to watch, to keep it in a saleable condition for the customers. It is easy to get that white sack dirty. You understand freight carloads, it's all flour, [fol. 319] paper put down, and paper separating everything to keep it clean, paper around the walls, and paper covers it up, but when you get into LCL you don't have that, and therefore, it is subject to contamination and soiled sacks and torn sacks and what have you."

Mr. McKnight: Defendant rests.

Mr. Morgan: Will you give us a few minutes. We had anticipated that it would take a great deal more time and we have had a number of witnesses supposed to be here and they were here in the morning. We will get on the telephone and try to get them here as quick as we can, and if you will give us five minutes—

The Court (Interrupting.) I will give you 15 minutes.

Mr. McKnight: In view of the discussion we had before recess at noon is the reason we rested at this time.

The Court: Yes: Take a recess of 10 minutes.

PLAINTIFF'S REBUTTAL TESTIMONY

ED SPROLES, being duly sworn on behalf of the Plaintiff, and examined by Mr. Christopher, testified as follows:

Q. Your name is Ed Sproles?

A. Yes, sir.

[fol. 320] Q. You live here in Ft. Worth?

A. Yes, sir.

Q. How long have you lived in Ft. Worth?

A. 40 years.

Q. In what business are you engaged?

A. Common carrier motor freight.

Q. You operate a line under what name?
A. Sproles Motor Freight Lines Inc.
Q. How long have you operated the motor freight line?
A. For about 21 years.
Q. Started a long time ago?
A. Yes, one of the first.
Q. What is your position with Sproles Motor Freight Lines?
A. President.
Q. That is now a corporation?
A. *Yes, sir.*
Q. For a number of years you operated independently as just Ed Sproles before it was incorporated?
A. Yes.
Q. Who is the substantial owner of the Sproles Motor Freight Line?
A. I own 98% of the stock.
Q. Through these 21 years, have you been active in the conduct and management of the Sproles Motor Freight Line?
A. Yes, sir.
Q. The headquarters of Sproles Motor Freight Lines is here in Ft. Worth?
A. Yes, sir.
Q. Has Sproles Motor Freight Line operated into Wichita Falls?
A. Yes, sir.
Q. How long have you operated to Wichita Falls?
A. Since 1925. I believe.
[fol. 321] Q. Mr. Sproles, tell us the routes over which you operate from here to West and Northwest?
A. From Ft. Worth?
Q. Yes?
A. We operate between here and Wichita Falls daily via Bowie, Decatur, Henrietta, and we operate also to Wichita Falls via Jacksboro, two routes.
Q. So that in operating West and Northwest, say from here to Amarillo, through Wichita Falls over both routes?
A. Yes.
Q. That it by Henrietta and also by Jacksboro?
A. Yes, sir.
Q. Mr. Sproles, does your line serve all intermediate points from here on clear on through Amarillo?

A. Through Amarillo—from Ft. Worth to Amarillo via the two routes.

Q. Via both routes?

A. Yes.

Q. Does your line operate into Dallas?

A. Yes, sir.

Q. Over what route from Wichita Falls does it operate into Dallas?

A. Via what we call the Rhome cut off, highway 114 and via Ft. Worth to Dallas.

Q. That would be by Grapevine and Rhoanoke, is that right?

A. Yes.

Q. How does that come out—

A. (Interrupting.) They call it the Northwest highway out of Rhome.

Q. That would be the regular Wichita Falls-Ft. Worth highway that goes by way of Henrietta to Rhome and comes through Rhoanoke and Grapevine and into Dallas?

A. Yes, sir.

Q. And as you say, you also come through Ft. Worth and go into Dallas?

A. Yes, sir.

[fol. 322] Q. In addition to that, Mr. Sproles, do you operate South of Ft. Worth and Dallas, if so, tell us where?

A. We operate South to Waco, via Waco and into Houston over No. 6 highway, and operate to Dallas, and then South over 75 to Houston out of Dallas and Ft. Worth.

Q. It appears to me perhaps that you have some other operations out West of here, and you described all the routes, or do you also operate beyond Graham and out on those roads?

A. We operate from here to Graham via Jacksboro.

Q. What are the towns between Jacksboro and Graham on that road?

A. Only one town, Bryson.

Q. Mr. Sproles, you have been conducting the greater portion of that operation through the last ten or twelve years at least, haven't you?

A. Yes, sir.

Q. You have operated to Wichita Falls for how many years?

A. Since 1925, I believe.

Q. Since 1925 to Wichita Falls?

A. Yes.

Q. And you have also operated on to Houston since how long?

A. 1928.

Q. Then you have operated all the way into Amarillo, for how long?

A. Approximately six years, from Wichita to Amarillo.

Q. That is what I am talking about, but you have operated also from Wichita to Vernon longer than that?

A. Went to operating to Vernon since about the time we went to operating at Wichita Falls, about 1925.

Q. Are you acquainted with the other motor freight lines that operate into and out of Wichita Falls in intrastate commerce?

A. Yes, sir.

[fol. 323] Q. What other motor freight lines operate out of Wichita Falls?

A. This way?

Q. In every direction out of Wichita Falls?

A. I know some of the operators there that operate on designated routes, and some probably I do not know.

Q. Give us the ones you know?

A. Miller & Miller operates out of Wichita Falls. The Tarry Motor Freight Lines, and Central Motor Freight Lines, and the English Motor Freight Lines, the Yellow Transit Motor Freight Lines, Boyles Freight Lines, operates out of there. Pluncket Motor Freight Lines operates out of Wichita Falls, and others operate out of there, but I do not recall the names.

Q. But you do recall that many operate out of there?

A. Clanton Transportation operates out of there.

Q. So, in fact, you have a number of motor freight lines these are common carriers you are referring to?

A. Yes.

Q. You have a number of common carrier motor freight lines that operate into and out of Wichita Falls?

A. Yes, that is right.

Q. Within your personal knowledge, Mr. Sproles, do those various motor freight lines you have mentioned, operating, do they operate on all directions out of Wichita Falls, North, South East and West?

A. Pretty well all directions out of Wichita Falls.

Q. Pretty well all directions?

A. Yes.

Q. By reason of your having been in the common carrier motor freight business for many years, are you familiar with the different types of equipment that various common carrier motor carriers operate?

A. I would say I would be.

Q. Are you familiar with the various types of equipment that these carriers operate into and out of Wichita Falls?

A. Yes, sir.

[fol. 324] Q. Will you describe for us the different types of equipment that common carriers operate into and out of Wichita Falls?

A. Most of the common carriers who operate out of Wichita Falls, operate what we call six wheel units, truck and trailer units, and the van type trailer, most all of them use that type of equipment or that class of equipment with the exception of two or three smaller operators. There are some operating out of Wichita Falls that use the van type equipment. Plunkett Motor Freight Lines operate out of Wichita Falls using both van type and trailers, and what we call bob trailers.

Q. Bob tail trailers, you mean by bob tail trailers just a four wheel truck?

A. Yes.

Q. Motor and body all in one unit?

A. That's right.

Q. For the purpose of transportation of this general class of commodity is there any difference, for the purpose of transporting between a bobtail truck as you have described it and a trailer unit as you described it?

A. That depends largely upon your operation, and the amount of tonnage you handle and the distance. We have some of what we call the bob tail trucks that make some of the shorter routes that we can deliver off of easier, but ordinarily on our longer runs we use the van type trailer.

Q. Both used for transporting commodities?

A. Yes, sir.

Q. Use in actual operation, whichever one would be the most convenient to transport the load?

A. Yes, if we have a smaller load, we are running on schedule, we have a small load of freight going up to Graham for instance, or from Wichita Falls to Bowie, we

probably would put that on a small truck, we would not run a large truck with that small load of freight. It is more economical to run the smaller truck.

[fol. 325] Q. You mean the smaller truck, probably one of these bobtails?

A. Yes.

Q. Mr. Sproles, on those trucks that are operated, bobtail trucks or trailer units, are some of those units strictly van type with closed trailers or maybe some of them with open top with tarpaulins, tell us about that?

A. We have both kinds. We have refrigerator trailers and have semi refrigerator trailers and we have trailers that just close up, and we have some I would call tarp topped trailers where we would porbably have to haul some freight that way that we would take a tarpaulin, we could take the tarpaulin off and put the freight in the truck, commodities that would be higher than the van.

Q. You have been relating your own equipment, do you know whether or not these other carriers that operate into Wichita Falls like for instance the Central Freight Lines, operate equipment similar to yours?

A. We all use practically the same kind of equipment, we handle the same class of merchandise principally and have the same schedules and we all handle the same class of equipment, practically. Motor carriers over the state have about the same class of equipment.

Q. As to the equipment makes, or different types of equipment, what different makes or models is operated generally, whether Chevrolet, Ford or whatever it happens to be?

A. We have most all of them and different types of equipment and they have different makes of trucks, trailers. We do not have any certain kind of truck or trailer, we buy from all of the manufacturers. We do not use any certain size of truck or make of truck, Fords, Chevrolets, Whites and all of them.

Q. And that is true with the other carriers?

A. That is true in most every case I think.

[fol. 326] Q. If I were to mention to you bobtail White truck, you would know exactly what I was talking about wouldn't you?

A. Yes. I would probably know it was a white truck.

Q. You have seen that particular type of truck lots of times?

A. Yes, we use them.

Q. You have some of them?

A. Yes.

Q. If I were to mention a bobtail Dodge truck, you would know what kind of truck that was, you have seen those frequently?

A. We have some of them.

Q. So that, in fact, any of the trucks that we might mention to you, you are familiar with them and probably have some of them, haven't you?

A. I imagine most any of them that have been sold in the last few years, I have had some of them, and have some now. I think we have some of everything.

Q. It has been shown in evidence here that Mr. Steele, the plaintiff in this case, operates some bobtail White trucks and bobtail Dodges and maybe one other type, GMC, I believe it is; is there any difference in those types of trucks from the types of trucks which you operate?

A. No, sir, we operate GMC and the White trucks.

Q. And in fact, would you say whether or not most of the common carriers have similar types of trucks?

A. Most of them.

Q. Most of them have?

A. Yes.

Q. Mr. Sproles, you are acquainted with the mill at Wichita Falls, operated there by General Mills Inc., are you not?

A. Yes.

Q. How long have you known that mill at Wichita Falls?

A. For years, I imagine it was there when I went into Wichita Falls.

[fol. 327] Q. It was not General Mills?

A. No.

Q. It was a mill at that time?

A. Yes. It was a mill, I do not remember how long General Mills has been there, but I know they have been there a long time.

Q. Would you state whether or not Sproles Motor Freight Lines solicits transportation of commodities of General Mills?

A. Yes, sir, we get quite a bit of business from them.

Q. How long have you been handling business for General Mills and how long have you been soliciting that business?

A. Ever since we have been in Wichita Falls and they have been there.

Q. Since they have been there, or at least since you have been there?

A. Yes, most of our business with General Mills has gone out of Houston, we handle quite a few bags out of Houston to Wichita Falls.

Q. To General Mills?

A. Yes.

Q. You got some business from General Mills from Wichita Falls, outbound business, going away from the mill at Wichita Falls?

A. I do not know how much outbound business we got out of them, but they have been giving us some business over a period of years, just how much outbound I do not know.

Q. You don't know how much?

A. I do not know, but I imagine over a period, from month to month, we get some of the business from them inbound and outbound.

Q. Do you know what commodities it is that you haul as common carrier away from that mill?

A. No, sir, the only commodities that I recall was that we moved bags into Wichita Falls for General Mills, the [fol. 328] outbound, I do not know what they handled. That is, I do not know what they were for General Mills.

Q. You mentioned you hauled bags inbound from Houston, did you haul bags from Dallas to their mill at Wichita Falls?

A. Yes, sir, I think we got bags out of Dallas.

Q. Do you know what they ship from Wichita Falls mill?

A. Well, in a general way. I know about what they ship. I am not familiar with it, but I know in the run of a month, they got some business of the General Mills going up and down the line.

Q. It has already been shown in this record that they ship flour from that mill at Wichita Falls——

Mr. McKnight (Interrupting): Object to counsel leading the witness and making statements about what has been shown.

Mr. Christopher: That is admitted, is it not?

Mr. McKnight: I am not saying one way or the other.

Mr. Christopher:

Q. Assume, Mr. Sproles, that General Mills ships flour, would the Sproles Motor Freight Lines haul flour from Wichita Falls to anybody on your line?

Mr. McKnight: I object to that, the witness has already stated he is not familiar with the commodities that were hauled out of Wichita Falls, and it would be calling for a conclusion and is immaterial and improperly stated at this time.

[fol. 329] The Court: I overrule the objection. He asked him would he handle it.

Mr. Christopher:

Q. Answer the question?

A. Yes, we move any commodity tendered us, at Wichita Falls, to any point.

Q. Whether that was flour, wheat, or anything else, would you move it?

A. We are set up for that business.

Q. Do you have equipment on which you could move flour?

A. Yes, sir.

Q. Do you know whether or not as a matter of fact you have hauled flour over your lines?

A. Yes, we have hauled flour; we haul flour most all the time. We serve quite a few places with groceries and grocery mixtures of flour and other commodities, kind of wholesale groceries.

Q. Flour is one of the items that makes up the grocery mixture is it not?

A. That's right.

Q. If you were tendered a shipment of flour, how do you handle it on your trucks?

A. It depends upon the size of the shipment; if it is just an ordinary shipment, of course, we handle it in our truck with our general run of freight. We handle flour

in our van body, as well as other merchandise. We handle meat packed in ice. We have to of course handle those things. We have different commodities we load our trailer with daily, and distribute to these smaller points.

Q. As a matter of fact, the actual practice, Mr. Sproles, do you provide some protection for those kind of commodities from other commodities?

A. Yes, we have got to protect that shipment. We have got to keep all of the shipments clean. We have to deliver [fol. 330] flour, when we have a flour shipment, we have to keep it clean and in order. That is why we have the Sproles van trailers.

Q. Does your line and the other common carriers have closed van trailers which will protect your shipments from dust and dirt and moisture and contamination and so forth?

A. Most of the common carriers have practically the same kind of equipment; we have some vans, some open top jobs and some what we call—but most of the common carriers have practically the same kind of equipment we have.

Q. You say you have some open top jobs, I believe you used those words?

A. Yes.

Q. On those type of trucks do you — tarpaulins, or tarps as you call it?

A. Yes, tarp tops.

Q. Does the tarp protect the commodity that is moving in the truck from dust or most of the things that might get in and contaminate anything?

A. It does not protect merchandise like a closed in van trailer, but in our business we have to use some of these tarp job trailers on account of the nature of the commodities we are hauling, commodities that we might have in those trailers with the tarp top. We handle most any commodity we handle in those tarps because it protects the merchandise.

Q. Those open tops and the vans——

A. (Interrupting.) We run those open top jobs along with our closed in jobs, we have to have one at every station most every day in case they have to load something in a trailer that they could not get in a closed top, and they can raise the tarp and load it.

Q. Tell us exactly what you mean by a closed top, please?

A. It is a van type trailer, with two solid doors in the rear, doors and a tail gate, and you raise your tail gate [fol. 331] and lock your doors and that is what we call a van closed trailer.

Q. What kind of a top has it got on it?

A. Has a regular sheet iron top.

Q. A regular sheet iron top?

A. Yes, sir.

Q. It is a regular closed top van then that has got a regular sheet iron top and you can close it up at the back and protect the commodity better than one of these open top jobs you were talking about?

A. Yes, there is more protection in one of those trailers closed up than there would be in these tarp jobs.

Q. Most of the common carriers that operate into Wichita Falls have both open top jobs and closed van trucks as well?

A. That's right.

Q. As far as you know, do all of them have that class of equipment?

A. Most everyone I know has that type of equipment.

Q. If you were tendered a shipment of cereals like wheaties for instance or a commodity of that type, are you prepared to haul it?

A. Yes, sir.

Q. Have you got the necessary equipment to haul it?

A. Yes, sir.

Q. You were tendered a shipment of that kind—would you haul it?

A. Yes, sir.

Q. Within your personal knowledge would all of the other common carriers operating into Wichita Falls do the same thing?

A. I imagine they would, they are set up for that purpose, I imagine they would.

Q. Mr. Sproles, how many schedules do you operate out of Wichita Falls daily both bound toward Amarillo and bound South through Dallas and Ft. Worth and into Houston?

[fol. 332] A. We operate a schedule out of Wichita Falls South to Dallas daily and operate a chedule out of Wichita Falls to, Wichita Falls to Ft. Worth daily, and a schedule between Wichita Falls and Amarillo daily.

Q. Does that then contemplate the use of one or more trucks?

A. It would take three trucks from Wichita Falls, that is out of Wichita Falls daily to care for our schedules, one North and two South, we call it South.

Q. Mr. Sproles, if you have more than you can move on one truck, are you prepared to run additional trucks if necessary?

A. We have trucks going to Wichita Falls that leave out of there in the morning. This schedule I am talking about is the schedule out of there at two o'clock in the afternoon, but we have them leaving there really in the morning, going up and coming back. We have several trucks in and out of Wichita Falls every day.

Q. Does that truck coming out of Wichita Falls early in the morning carry a shipment this way?

A. Hauls shipments both ways, a truck leaves out of Wichita Falls about seven o'clock in the morning going North, and delivers shipments to intermediate points between Amarillo and Wichita Falls.

Q. And in addition to the seven o'clock early morning schedule I believe you said you had one about two o'clock in the afternoon?

A. That comes South.

Q. Do you have regular schedules out of Wichita Falls in the afternoon at two o'clock?

A. It would just be a truck that would go out of there and unload and come back, it would not be anything definite about the schedules after two o'clock, might be a truck and might not after two o'clock.

Q. If you had any shipments tendered to you at Wichita Falls, which could be moved on that truck would you move them?

[fol. 333] A. Yes.

Q. Coming back?

A. Yes.

Q. In other words, Mr. Sproles, any time a shipment is tendered and you have a truck there to move it, you would move it?

A. We would put it on and bring it, we move this merchandise out of our station as fast as we can make it up.

Q. Within your personal knowledge, do the other common carriers operating out of Wichita operate in about the same manner you do?

A. Practically.

Q. Now, Mr. Sproles, suppose that you are tendered the truck load of freight, does your line take it and move it at any time it is tendered you?

A. We would have a truck for them.

Q. If General Mills would call you at seven o'clock in the morning and tell you that they have a truckload of flour they would like to leave there at nine o'clock in the morning, could you and would you give them a truck upon which to move that load at nine o'clock or ten o'clock or the hour they specified?

A. That is right, of course we would unload and send a truck.

Q. Send a truck right out to the mill, is that right?

A. Yes. At these stations we have an extra trailer or two or truck or two at these different stations. It would probably take an extra trailer, and we would take an extra trailer to General Mills to load their load, and the next truck that come in, they would give this to them. That would be on our line, of course.

Q. If they tender you a truck load of freight, would you say you would send a pickup delivery truck out there, or would you send a truck that would go out there and take that load and take it directly to the destination?

[fol. 334] A. No, any truck load of freight that is tendered us, we would not go out and haul that in our local pickup truck, we would take our body, load our van bodies.

Q. Load it right into the truck where it is moved from the mill to destination?

A. Yes, that is it.

Q. Within your personal knowledge do common carriers generally and common carriers at Wichita Falls in particular do the same thing?

A. We probably handle our business there the same as we would here, when we get a truck load of freight we always arrange to go out and pick it up in the body that is going to destination wherever the point might be, we load it direct.

Q. What I asked you—I don't guess you understand the question—what I asked you did other common carriers operating at Wichita Falls handle a truck the same way as you do in that respect?

A. That is the general practice with common carrier trucks. We even exchange trailers to keep from handling

that merchandise the second time. I get a truck load of freight to go to San Antonio, and I bring it in here and I don't unload it, I would turn my trailer over to the connecting lines, and he would take my trailer to San Antonio and unload it out of my trailer.

Q. So those would never be handled from the time they went in the truck?

A. That is right, that is the common practice.

Q. If you had a truckload of flour tendered to you at Wichita Falls, going, we will say, to Brownwood out here, how would you handle it, you would interline that here at Ft. Worth, wouldn't you?

A. Yes, sir.

Q. And assuming we will say that you did interline here at Ft. Worth with the Johnson Motor lines, which do operate to Brownwood, would you simply give that [fol. 335] trailerload of stuff to Johnson and he would put his trailer out there?

A. He would put his trailer on my trailer or his tractor on my trailer I mean, and move it. Unless it was some of these commodities that could be handled off and on the trailers pretty easy without a lot of labor and expense, we unload then. Where there are a lot of packages and a lot of labor involved, we exchange trailers and pay each other for the use of the trailer.

Q. That is the general practice of common carriers throughout the state?

A. That is right. Seal it, and when we get to the destination break the seals.

Q. Mr. Sproles, from Wichita Falls, is it or not true that either you or some common carrier, either some other common carrier, motor carrier I am talking about, either directly or by connection, handle shipments to practically, if not practically every point within a radius of 150 miles of Wichita Falls?

A. We do, on our own line, yes, sir.

Q. That is either directly—you could carry it to nearly any point within that radius?

A. If we were tendered freight—we are tendered property or a product at Wichita Falls going—we ship out of Wichita Falls to Louisiana and East Texas and make connections here.

Q. Practically any point you name, either you or some other carrier would either directly or by interline take that shipment to destination?

A. Yes, that is the service we set up there to perform.

Q. You say you set up to perform, and, that as a matter of fact, do common carriers perform that service?

A. We do perform, that is we do the best we can to perform services like that.

Q. It is being done every day is it not?

A. Yes; we are not doing it as easy as we used to when we could get help to do it with, but we do a pretty good job of it.

[fol. 336] Q. That is due to the trouble of getting help?

A. Yes.

Q. Mr. Sproles, in addition to that, do you render a regular pick up and delivery service in Wichita Falls?

A. Yes, sir.

Q. For any shipper that has less than a truck load shipment in Wichita Falls, will you go out to his place and pick it up?

A. Yes, sir.

Q. Do common carriers at Wichita Falls do that?

A. Yes, sir.

Q. After that shipment is picked up, whether it is in truck load lots or in less than truck load lots, when it arrives at destination, do you deliver it to the store door or consignee's door?

A. If it is a truckload, we probaly deliver if to the customer's door; if it is LCL we have in small towns where we have agents, or there is agents that we leave these small shipments with and they would make deliveries to the customers.

Q. So you actually serve both pick up and delivery service where the shipment is picked up, to the shipper's door, and deliver it to the consignee's door?

A. That's right.

Q. Do all common carriers operating in Wichita Falls have the same pick up and delivery service?

A. As far as I know, they do.

Q. You are acquainted, are you not, with the operation of railroad at Wichita Falls, you are, aren't you?

A. Yes, sir.

Q. Do the railroads have a similar pick up and delivery service?

A. Yes, sir.

Q. In other words they pick shipments up at the store door or at the consignor's place of business and then deliver to the store door of the consignee?

[fol. 337] A. In most places they make deliveries to the consignee, in some places, I understand they do not, but they pick up and make deliveries in most all cases.

Q. I believe, Mr. Sproles,—or rather, were you familiar with the operations of Leo H. Steele, contract carrier at Wichita Falls?

A. I do not know much about his operations, but I knew that he did operate some trucks up there for General Mills, I do not know anything about his operations.

Q. You do know that he made application to the Railroad Commission for a contract carrier permit?

A. Yes, I do not know that he made application to the Commission for a contract carrier permit.

Q. Did you do anything about that application, if you know, what did you do at the time the application was made?

Mr. McKnight: I object to that if the Court please, because it is immaterial and irrelevant to any issue in the case.

The Court: I overrule the objection.

Mr. McKnight: We except.

The Witness: The first application filed, if I remember right, we protested it, and later the second application for Mr. Steele was filed and we withdrew, as I remember, our objection to the issuance of that permit.

Mr. Christopher: Why did you protest the application?

[fol. 338] The Court: I will sustain an objection to that.

Mr. Christopher:

Q. Mr. Sproles, if a shipper tendered you wheat for transportation, would you handle it?

A. Wheat in bulk or out of the bags?

Q. Either way?

A. We handle some feed wheat, we do not handle much bulk wheat. I don't know that we ever handled any bulk, we have handled feed wheat in sacks and cotton seed and corn and feed of all kinds, but as far as bulk wheat is concerned, I do not know that we have ever been tendered

a shipment of bulk wheat. I do not know that we ever handled a trailer load of bulk wheat.

Q. You have never been tendered any?

A. That's right.

Q. Suppose they tendered you a trailer of bulk wheat, are you prepared to haul it, do you have equipment to haul it?

A. That is some problem that we would have to work out, I do not know about the rates. I do not know about how we would go about loading and unloading. If we were tendered a truck load of wheat, if the rates were established and we could handle it at the rates there are lots of carload orders that we cannot handle, but that would have to be worked out I imagine. We would have to get our equipment in some kind of shape to handle a truck load of wheat. Most of our ordinary freight bodies would not haul wheat without having some sides or something done to them. We have never done it, as far as I know, never been offered a load of bulk wheat. We have handled a lot of wheat and different seeds in sacks, where it is sacked up in 100 or 200 pounds sacks.

Q. Are you prepared to and do you handle shipments of various kinds other than feed stuffs?

A. Sacked feed and stuff, we handle a lot of sacked feed stuffs.

[fol. 339] Q. Have you had occasion through these years to observe the operation of contract carriers?

A. There have been quite a few contract carriers certificates issued by the Railroad Commission since 1935, when this Motor Carrier Act was passed. Since then there have been quite a few contract carrier permits issued by the Railroad Commission.

Q. Assuming, Mr. Sproles, that Leo H. Steele is given a straight load of flour to move from Wichita Falls to say, Rhome, Texas, out here, and you are tendered a truckload of flour to move from Wichita Falls to Rhome, tell me what difference, if any, there would be in the transportation of that flour?

Mr. McKnight: I object to that. He has stated that he is not familiar with these operations, and I object to how he would handle it.

The Court: He can tell his own part of it; I sustain the objection as to—unless he knows, you are asking for his

personal knowledge. That involves how Steele handles it and also involves how you handle it, if you know, you can answer that.

The Witness: I know how I handle it, I do not know just what the situation would be, the way he handles it. I know how I handle it, I know how I would do.

Mr. Christopher:

Q. Assume that you are tendered a truckload of flour by General Mills at Wichita Falls, from where would you load the flour, and what would you do in handling it from Wichita Falls to Rhome?

A. If General Mills wanted us to move a truckload of flour, we would want to know the first thing when the [fol. 340] load would be ready, and when could we load it. They would say two o'clock in the afternoon, or twelve o'clock, whenever they were ready, we would try to have a trailer there; and ordinarily line that with paper. We would go and load that at the shipper's convenience. We would carry it and unload it at the customer's door or sidewalks.

Q. Now, assuming, Mr. Sproles, that Leo H. Steele is tendered a truckload of flour, and assume that he loads it at the docks of General Mills, and assuming that he delivers it at the customer's door at Rhome, what would be the difference in the service that you would offer and that he would offer?

Mr. McKnight: We object to that, first, it is calling on the witness, when the witness does not testify—that is a hypothetical question when the witness does not testify—that is a hypothetical question——

Mr. Christopher: (Interrupting.) Based on the undisputed fact in this case, and the witness is an expert.

Mr. McKnight: And a question of fact that is the subject of expert testimony.

The Court: I overrule the objection.

Mr. McKnight: Also object on the ground that it is hypothetical, that—does not involve all of the elements of service that was rendered by Mr. Steele, as disclosed by the undisputed records in this case, and the witness would have to be advised on those things.

[fol. 341] The Court: I overrule the objection.

Mr. McKnight: We except.

The Witness: In my opinion, Mr. Steele would load the flour the same as we would do and transport it down there over the same highway and deliver it to the customer the same as we would.

Mr. McKnight: We move to strike that answer.

The Court: Overrule the motion.

Mr. McKnight: We except.

Mr. Christopher: That is all.

Cross Examination

By Mr. McKnight:

Q. In that load that we were just talking about to some theoretical customer at Rhome, that might be a truckload of flour when your trucks got three, if you moved the flour for General Mills, you were unloading the flour at the Customer's dock or sidewalk?

A. Yes, sir.

Q. And leave it there?

A. Yes.

Q. That would be the end of it wouldn't it?

A. That's right.

[fol. 342] Q. Mr. Sproles, you have been engaged as a common carrier in the Motor Trucking Business ever since the trucking law went into effect, have you not?

A. Yes, sir, and before.

Q. You were engaged in the trucking business before we had a motor carrier law?

A. That's right.

Q. You have engaged and operated as a common carrier since that law went into effect?

A. Yes, sir, that's right.

Q. You have devoted your facilities and your truck and your equipment to the company's business in connection with that common carrier law?

A. Yes.

Q. Accepted such products and such merchandise as were tendered to you and which you were equipped to handle?

A. Yes, that is right.

Q. And regardless of who the consignor was your obligation as a common carrier was to accept and move the goods?

A. Yes, sir.

Q. If it was a character of goods that was so your set up could move it?

A. Yes.

Q. You maintain in connection with the operation of your business as a common carrier, maintain depots don't you?

A. Yes, sir.

Q. You maintain warehouses?

A. Yes, sir.

Q. And the various other facilities that are necessary to the conduct of your business, garages and things like that don't you?

A. Yes, sir.

Q. You maintain, as you said a while ago, a pick up and delivery service?

A. Yes, sir.

[fol. 343] Q. In other words, in all instances where a shipment is tendered to you is what you classify as LCL, you send your pick up truck out to the customer's dock and pick it up and take it to your warehouse or central loading place, whatever you may call it, depot might perhaps be a better word, and transfer it there to your line truck and take it either to a destination on your line or interline it to some other line if it is on another line?

A. Yes.

Q. Your central depot is where you ordinarily take it and put it in a delivery truck and take it out to the customer's side walk and unload it?

A. That is right, or all LCL freight less than a truckload.

Q. Less than a truckload, less than truckload lots?

A. Yes.

Q. When it is in truckload lots and consigned to a customer in a truckload, you ordinarily take your line truck out and pick it up at the place, you otherwise would pick up LCL shipments in a pickup truck, and deliver it, where you otherwise would deliver LCL shipments at the customer's sidewalk, and take it all and deliver it. Now, on LCL interline LCL shipments as distinguished from interline truckload shipments, you transfer the commodities to the other trucks don't you?

A. Yes.

Q. This business of transferring trailers at such central points in interlines—that is a matter that has grown up and a practice that has grown up in recent years, and more now than it ever was?

A. That is right.

Q. That has developed in the last year or two to a considerable extent, has it not?

A. Well, I would say, if I would say in the last two or three years; we have done more of it in the last two or three years.

[fol. 344] Q. Now, as a common carrier, Motor Carrier, you maintained an office overhead for the office clerical help, and various administrative employees of that kind don't you?

A. Yes, sir.

Q. You maintain solicitors to solicit business, at least in normal times, maybe in this emergency you do not?

A. We did up until a year ago.

Q. Up until this emergency you maintained a regular corps of solicitors?

A. Up until a year ago.

Q. Advertised in newspapers and other periodicals?

A. Yes.

Q. You had printed circulars or schedules and distributed among your customers as showing your routes and schedules and where your services were available and where a particular customer could or should use it?

A. Yes.

Q. In other words the sale of your services to the public was important, was an important element in the operation of your business?

A. Yes.

Q. In addition to that, you maintained an executive office, legal department and all of those things for the conduct of your business as a common carrier?

A. That's right.

Q. You also had claims to settle and adjust from time to time for articles of merchandise that might be damaged or injured in shipment?

A. That's right.

Q. And that involves considerable expense and considerable work, those claims, didn't it?

A. A certain percent of our revenue went for that.

Q. A certain percent of revenue goes to the adjustment of claims and you have to have claim agents to do that and clerks to do that?

A. Yes.

[fol. 345] Mr. McKnight: I believe that's all.

Mr. Morgan: No further questions.

(Witness excused.)

Mr. Morgan: Some of our witnesses are out and I am not sure that we can get them here this afternoon, but we will try. Some of them are out of the city and I am not sure that we can get them here this afternoon.

The Court: Take a recess of ten minutes.

(After recess.)

Mr. Morgan: If your Honor please, for the purpose of the record, I am not certain that a while ago in my objection to the testimony offered that I made this objection, but to the transcript of the testimony offered of Mr. Steele, I want to include the additional and further objection that it is hearsay, and therefore, I now move the Court to strike all of that portion of the reading of that testimony done by counsel for Defendant wherein he read from what purported to be a transcript of some testimony of plaintiff Steele before the Railroad Commission, for the reason that it is incompetent, immaterial and irrelevant, and the further reason that it is hearsay, and has no bearing on the case in any way.

The Court: I overrule the objection.

[fol. 346] Mr. Morgan: All right.

Now, if Your Honor please, we are in this situation: we had summoned here and they have been here, and the Court probably knows certain witness of Miller & Miller Truck Lines, who operate in Wichita Falls, and Mr. Tarry, of the Tarry Motor Freight Lines, and Mr. Webster of Denton, who formerly operated a line. We have had difficulty in locating these folks this afternoon. And furthermore, our theory of this case is that testimony is immaterial, and we do not think bears on the law questions involved, and in view of that situation, we rest.

DEFENDANT'S REBUTTAL TESTIMONY

Mr. McKnight: The Defendant offers in Evidence, the certificate of L. D. Ransom, Secretary of the Railroad Commission of the State of Texas, under date of the 24th day of October, 1944, in which he certified that the attached photostatic copies of the three letters dated March 10, 1941 addressed to the Railroad Commission of the State of Texas and signed by J. P. Tarry, and photostatic copy of a letter dated March 12, 1941, addressed to the Railroad Commission, and signed by M. R. Webster or Webster & Webster, and photostatic copy addressed to the Railroad Commission of Texas, signed by Paul D. King, for Miller & Miller Freight Lines, are true and correct copies of the original documents now on file as a part of Defendant's record in the Railroad Commission of Texas, and it says, I quote "I further certify that I am the legal custodian of the records etc., of the Railroad Commission of Texas.

Mr. Morgan: Before he reads any more——

[fol. 347] Mr. McKnight: (Interrupting.) I am not going to read anything; I will give you an opportunity to make an objection to it, I want to offer the certificate and also three lettters, or photostatic copies of letters which are attached to the certificate.

Mr. Morgan: We object to them for every reason known, your Honor; in the first place it is hearsay; in the second place it is not responsive to anything offered heretofore in evidence in this case, and it is an exparte proceeding and no part of this proceeding, the parties are not here and it is wholly immaterial.

Mr. McKnight: It is another proceeding in which he filed application for a permit, these are documents filed in that proceeding, documents signed by these same parties to whom he referred, and certainly are in rebuttal to testimony brought out by Mr. Sproles.

The Court: I sustain the objection.

Mr. McKnight: Note the exception. We will now offer the documents which I have tendered a moment ago, and which I marked Defendant's Exhibits No. 10; we offer the certificate and the three letters collectively and separately, and I understand the Court sustained the objection.

(For the purposes of a bill only, the testimony having been excluded from the jury, said Exhibit No. 10 above offered is as follows:)

[fol. 348] DEFENDANT'S EXHIBIT No. 10

State of Texas,
County of Travis.

I, L. D. Ransom, Secretary of the Railroad Commission of Texas, do hereby certify that the attached Photostatic copy of letter dated March 10, 1941, addressed to the Railroad Commission of Texas and signed by J. P. Tarry; Photostatic copy of letter dated March 12, 1941, addressed to the Railroad Commission of Texas, and signed by M. R. Webster, for Webster Truck Lines, and Photostatic copy of letter, dated March 6, 1941, addressed to Railroad Commission of Texas and signed by Paul D. King, for Miller & Miller Motor Freight Lines are true and correct copies of the original documents now on file as a part of the permanent records of the Railroad Commission of Texas, and I further certify that I am the legal custodian of the records, files and seal of the Railroad Commission of Texas.

Given under my hand and seal of the Railroad Commission of Texas, this the 24th day of October, 1944.

L. D. Ransom, Secretary, Railroad Commission of Texas.

[Seal]

* * * * * * *

[fol. 349] Tarry Warehouse & Storage Co.,
Wichita Falls, Texas.

March 10th, 1941.

Subject: Application of Leo H. Steele, docket 9705, Contract Carrier Certificate.

Railroad Commission of Texas,
Motor Transportation Division,
Austin, Texas.

Gentlemen:

With reference to the above mentioned docket, advise that we do not intend to make any protest or enter our appearance against this application for a contract carriers certificate to haul the following commodities:

Manufactured products of General Mills, Inc., Wheat, in bulk.

Our opinion is that common carriers cannot render the character of service needed by General Mills, Inc., to haul or distribute these products. We do, however, disapprove of the granting of authority to contract haulers to haul any products that would tend to deplete the revenue of common carriers where a common carrier freight line can handle the tonnage as efficiently as contract carriers.

Yours very truly,
Tarry Motor Freight Lines,
(Sgd.) J. P. Tarry, President.

* * * * * * *

[fol. 350] Webster Truck Lines,
Denton, Texas.

March 12, 1941.

Railroad Commission of Texas,
Motor Transportation Division,
Austin, Texas.

Gentlemen:

Regarding your contract carrier Docket No. 9705, which covers application filed by Leo H. Steele to operate as the Steele Distributing Co., of Wichita Falls, Texas, for contract carrier permit to handle the products of The General Mills, Inc., from mills at Wichita Falls and Amarillo, Texas, to their customers.

After due investigation and consideration of the proposed operations and the facts as set out in the application we wish to advise the Commission and go on record as offering no opposition to this application.

The proposed operation is of such a nature as to render a distinct service to the public to be served, as well as to the General Mills, Inc., that the common carriers cannot possibly render. The operation at the present time is being performed by their own trucks in order to meet the needs of small lot buyers, who require prompt and efficient service. This is required in addition to the service of the railroads and motor carriers which are today and will continue in the future to handle practically 90% of their products.

For these reasons we do not oppose the granting of this proposed application by the Commission.

Yours very truly,
Webster Truck Lines,
(Sgd.) M. R. Webster, General Manager.

[fol. 351] ces The General Mills, Inc., Wichita Falls, Texas.

(Rubber Stamp: Received Mar. 17, 1941, Railroad Commission Motor Transportation Division.)

(Pencil Note Side of Letter: To Examiner hearing Dkt. 9705, for your information I believe it should be shown in the record that Webster does not protest. (Sgd.) J. E. K.)

* * * * * * *

Miller & Miller Motor Freight Line,
General Office Wichita Falls, Texas.

March 6, 1941.

Railroad Commission of Texas,
Motor Transportation Division,
Austin, Texas.

Gentlemen:

You will please refer to your contract carrier docket No. 9705, covering application as filed by Leo H. Steele, operating as the Steele Distributing Company of Wichita Falls, for contract carrier permit to handle the products of General Mil-s, Inc., from plants at Wichita Falls, Texas and Amarillo, Texas, to their customers in the territory adjacent to the mills.

In this connection, I beg to advise that we have been advised by both Mr. Steele and Mr. F. H. Cross, Traffic Manager of General Mills, Inc., of the proposed operations and that after investigating the facts as set out in the application, we wish to advise the Commission and go on record as offering no opposition to the granting of this application. It is my understanding from the above mentioned investigation that the granting of this application will supplement the service now being rendered by [fol. 352] the Common Carriers of Texas and will render a distinct service to General Mills Inc., and to the public to be served. And it is for these reasons that we do not oppose the granting of this application by the Commission.

Very truly yours,
Miller & Miller Motor Freight,
(Sgd.) By Paul D. King, Assistant Manager.

(Rubber Stamp: Received Mar. 8. 1941, Railroad Commission, Motor Transportation Division.)

* * * * * * *

Mr. McKnight: That is all.

The Court: Proceed with the arguments.

Mr. Morgan: We want to move the Court to instruct the jury to return a verdict for the Plaintiff; we do not think there ought to be any argument; this is a law question.

The Court: Do you want to be heard on that?

Mr. Morgan: Yes, sir.

The Court: Gentlemen of the jury, you will be excused until ten o'clock in the morning.

[fol. 353] Mr. McKnight: Now, may we excuse our witnesses?

The Court: Yes.

(Which was done.)

(After the jury had retired the following proceedings were had:)

The Court: Now, make your motions.

Mr. Morgan: I want to make this observation——

The Court: (Interrupting.) You may make your motion.

MOTION OF PLAINTIFF FOR DIRECTED VERDICT

Mr. Morgan: We ask the Court to instruct the jury to return a verdict for the plaintiff in this case for the reason that, first, the plaintiff made out a prima facie full case under the rate orders of the Railroad Commission, and the order stands uncontroverted. They are not void on their face, and they stand uncontroverted. There has been no testimony relating to the validity of the order and no testimony has been offered even assuming that you wish to take as true everything that has been said, there is no testimony offered that would in anywise affect or go to the validity of the order, therefore there is nothing to submit to the jury. There is no fact issue to be submitted to the jury, and it is only a legal issue, or legal point, as I said when we first started this case, and we move the Court that this case consists only of law questions and [fol. 354] ask that you simply instruct the jury to return a verdict for the Plaintiff.

Mr. McKnight: Your Honor, the Defendant, of course, opposes that motion, that has been made by counsel. I do not think it would serve any useful purpose to come and make further arguments on it.

The Court: If I decide to submit it on special issues what issues would you ask?

Mr. McKnight: If you submit it on special issues, I want to ask two issues, I believe, to be submitted:

1. On the issue of whether or not Mr. Steele's operations were operations in competition with common carriers, and one whether or not the services performed by him were substantially the same as performed by common carriers. In other words, the terms that are used in the statute. I think the Court would probably give the jury some definitions, some legal definitions. I would want the Court to submit those issues to the jury and I want to have an opportunity to submit to the Court some special instructions on the meaning and interpretation of those terms.

The Court: Explain to the jury what constitutes substantial service and competition etc.?

Mr. McKnight: Yes, I think the jury ought to have some instructions on that, and of course we would insist the bur-
[fol. 355] den of proof is on the Plaintiff to establish the existence of these things.

That motion the Court took under advisement that we made at the conclusion of the evidence. I would like to have the benefit of instructions on the burden of proof. I do not know what the Courts do on that or what the Court's views. Do I unde*d*stand the Court has taken under advisement a motion for a directed verdict made by the Defendant?

The Court: By both parties; I haven't acted on that.

Mr. McKnight: In other words, you took the motion under consideration and you still have that motion under consideration which I made to you yesterday?

The Court: Yes.

Mr. McKnight: Then you have the motion under consideration which has been submitted to you by Mr. Morgan a moment ago, as well as his other motion.

The Court: It is under consideration; I had not announced that. I took both of them under consideration.

Mr. McKnight: The other motion is before the Court and has not been acted on?

The Court: Yes.

[fol. 356] Mr. McKnight: I don't know, if the Court please, whether it is necessary for us to renew our motion made yesterday at this stage or not.

The Court: No.

Mr. McKnight: If it is necessary to do so—I want to check the rules and se if it is necessary, and I will make one in the morning. I do not think it is necessary, but I want to check on that. If it is necessary to do so, I want to reserve the right to offer the motion in the morning.

Mr. Morgan: We are assuming it is one motion, I did not mean this to be a separate motion.

The Court: I understand.

Mr. McKnight: I understand.

Mr. Morgan: We don't see that there is anything to submit; we are either right or wrong on this lawsuit.

I mean there is no fact issue. Let me call the Court's attention to this—let me ask you to re-read that Ft. Worth & Denver Case.

The Court: The Court will stand adjourned until in the morning.

[fol. 357] Morning Session December 14, 1944

MOTION OF DEFENDANT FOR DIRECTED VERDICT

Mr. McKnight: Comes now, the Defendant, General Mills at the conclusion of the evidence of this case, and without waiving its rights to have the Court submit this case to the jury on the issues of fact submitted in request contemporaneously filed herewith, should this motion be overruled, and specially reserving the right to have jury pass upon such issues of fact, should this motion be overruled, and moves the Court to instruct the jury to return a verdict for the Defendant herein for the following reasons to-wit:

(1) Because the Plaintiff has failed to establish any cause of action or claims upon which relief could be granted.

(2) Because the evidence conclusively shows that the transportation services performed by Plaintiff for the Defendant were performed under a contract, as evidenced by an original and supplemental contract introduced in evidence herein, and that such contract has been fully complied with and completed by the defendant, and Plaintiff has been paid, settled and accounted with strictly in accordance with said contract, hence no claim or cause of action exists in his favor for compensation sued for.

(3) Because the evidence in this case conclusively establishes as a matter of law that the tariffs and the orders of the Railroad Commission relied upon by Plaintiff herein are not applicable to the transportation service performed by Plaintiff for Defendant, or at least the evidence fails to show the applicability of such tariffs orders and rates of the Railroad Commission, hence no cause of action could be made thereon by Plaintiff.

[fol. 358] (4) And because even if by assuming that the order or orders of the Railroad Commission and the permit granted by the Commission to Plaintiff Steele, the tariffs were sought to be or attempted to be made applicable by the Railroad Commission, to the transportation service herein involved, the action of the Railroad Commission in any and all respects referred to is conclusively void in so far as they may be construed to fix rates covering this transportation service, in that the Railroad Commission was entirely and is entirely without authority of law to prescribe and fix such rates, in that it does not appear from the record of the Railroad Commission introduced in evidence that the Railroad Commission found the jurisdictional facts to exist necessary to authorize it to exercise the statutory power conferred upon it under Section 6aa, Article 911b, Revised Statutes of Texas.

That is to say there was no finding by the Railroad Commission that competition existed between the Plaintiff Steele and the Common Carriers over the general highways of Texas, and no findings that the services rendered or to be rendered by Steele were substantially the same as those rendered by common carriers; on the other hand, the records of the Commission conclusively show, as well as the order granting the permits, that such competition did not exist and that the services of plaintiff and the common carriers were not substantially the same.

(5) Because the record in this case fails to show that the Railroad Commission had jurisdiction to fix rates covering transportation services herein involved, if in fact the Railroad Commission did so, because the evidence fails to show that the Plaintiff Steele's operations were in competition with the operations of common carriers over the highways of Texas, and that the services performed or to be performed by him under the permit issued by the Railroad Commission, where substantially the same as those

[fol. 359] performed by common carriers. And that the record in this case conclusively shows, as a matter of law, that the operations of the Plaintiff Steele over the highways of Texas were not competitive with the operations of the common carriers, and were not substantially the same as those performed by common carriers.

(6) Because that even assuming, for the purpose of this motion, that the Railroad Commission did fix rates governing the transportation services herein involved, and that in doing so, it was acting pursuant to statutory authority from the State of Texas, it appears from the record herein that such certain statutory grants of authority and its application by the Railroad Commission, and the applicable orders, permits and other documents of the commission are violative of the constitution of the United States, and of the State of Texas in the various respects set forth in Defendant's answer on file herein.

The act or acts of the Legislature relied upon, as well as the acts of the Railroad Commission, done thereunder, are violative of the constitutional guaranties under the due process clause, freedom of interference of contract clause of the federal constitution and of the State Constitution, as identified and set forth in Defendant's Answer. Likewise such statute or statutes and applicable orders and acts of the Railroad Commission violate the legislative authority reserved to the Legislature of Texas, under the constitution of the Legislature in the manner and way set forth in Defendant's Amended Answer.

(7) Because no statutory cause of action or other right exist in Plaintiff to recover the so called tariff rates relied upon, even if applicable and valid. It appears that the State of Texas is the only one who can complain of a violation of certain tariffs and orders of the Commission, and specific procedure is set forth in the statute, therefore, no [fol. 360] cause of action exists in Plaintiff's favor to enforce the so called tariff rates at this time by collecting the difference between the contract rate paid and the so called Tariff Rate. Section 13, of the so called original contract, cannot be relied upon as a contractual cause of action, because such document, as well as the supplemental agreement are one and the same contract and the same transaction, and if one falls, both fall.

If in fact, the so called supplemental contract is illegal, as claimed by the Plaintiff, the illegality extends to the so called original contract, since both writings are dependent upon each other and constitute an evidence of one transaction.

(8) Because Plaintiff, through his conduct and the conduct of his counsel, and by *by* virtue of the agreement and recitations made in the so called supplemental contract, is now conclusively estopped from asserting any competition existing between himself and common carriers in operating their respective operations over the highways of this state, and is conclusively estopped from asserting the services rendered by him were substantially the same as services rendered by common carriers.

(9) Because Plaintiff is conclusively estopped from recovering herein because of his conduct and the conduct of his counsel, as disclosed by the evidence in this case.

This is respectively submitted by attorneys for Defendant.

The Court: I would like to have a copy of any requested instructions. I am going to submit the case to the jury.

[fol. 361] Mr. McKnight: I do not know what the Court's disposition is about the burden of proof.

The Court: I think the burden of proof is on you.

Mr. McKnight: Then we shall ask the Court the right to open and close the arguments.

Mr. Morgan: We think we have made a prima facie case. Merely because he has some defensive issues that does not change the burden of proof to the extent of his right to open and close the case. We think squarely we have the right to open and close that does not change that rule at all.

The Court: I will give the Plaintiff the right to open and close.

Mr. McKnight: Note an exception.

The Court: I do not know how many issues will be submitted to the jury, I may submit a number and then submit others. Do you admit that the Plaintiff is entitled to recover unless you are able to show that the Plaintiff's services were not in competition with common carriers and were not substantially the same as the same services performed by common carriers?

Mr. McKnight: I do not admit that.

[fol. 362] The Court: All right, proceed. That is the test.

Mr. McKnight: Note the exception.

(After arguments of counsel to the jury, the Court gave the following charge to the jury.)

CHARGE TO JURY

Judge Wilson: Gentlemen of the jury, I will submit to you just two simple issues.

First. Do you find from a preponderance of the evidence in this case that the operations of Plaintiff Steele under his contract with Defendant, were in competition with common carriers over the highways of Texas?

Answer: "Yes" or "No".

(The jury answered this question "No.")

Second. Do you find from the evidence in this case that Plaintiff Steele rendered substantially the same service as that rendered by common carriers, during the time and in the area of transportation herein involved.

Answer: "Yes" or "no".

(The jury answered this question "No".)

It might be well, even if I feel that you do understand what it is, to give you the definition of certain words or phrases which are used in the charge.

First as to competition. And this is a requested instruction by the Defendant, which I give you:

[fol. 363] You are instructed that competition in operations as used in the issues submitted to you involves the element of the substantial characteristics and the nature of the operations of the respective parties and in determining the existence of such competition in operations you shall also further take into consideration and compare the substantial characteristics and nature of the operations of the respective parties involved.

Now, I think about the best definition we will find in Webster, the material parts of it being as follows: It means the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time; common strife for the same object; strife for superiority; rivalry, as competition with a person for an object sought. Competition implies a

struggle or contest between two or more persons for the same object.

And substantially the same service is another very important phrase used in this case throughout, and in the law, as to that, I instruct you as follows:

You are instructed that substantially the same services as inquired about in the issue or issues submitted to you by the Court, means that the service being compared must be substantially the same in all of their material and essential elements. Services which are not substantially the same in all their essential and material respects will not be considered by you as substantially the same services as inquired about, and in the issues submitted.

Substantially the same service does not mean an identical service, but it must be really and actually in a substantial sense a similar service, taking all of the characteristics of the service into account.

Now a short question as to whom the burden of proof rests on in this case has been raised. In connection with that, you will be given this charge:

[fol. 364] The Defendant raises the issue presented here that the hauling done by the Plaintiff for the Defendant was not of such a character as to be in competition with common carriers; also, that the services performed by the Plaintiff for Defendant, were not substantially the services performed by common carriers. The burden of proof is therefore upon the defendant to establish its allegations by the greater weight or preponderance of the evidence. Unless you—satisfied from a preponderance or greater weight of the evidence that the Plaintiff's services for the defendant were not done in competition with common carriers, it would be your duty to find against the Defendant on that issue. Likewise if you are not able to find from the greater weight or preponderance of the evidence of the fact that services rendered by the Plaintiff for the Defendant were substantially the services rendered by common carriers, as to that issue, it would be your duty also to find against the defendant.

In other words, to answer the special issue submitted to you in the affirmative.

Gentlemen, you are the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony.

In this Court the judge can comment and give the jury his views as to the facts if he sees fit to do so, but I feel that you gentlemen are more competent in that field than I am, and I am leaving that entirely to your judgment, only that you are governed by the law, as submitted to you by the Court.

Now, in the progress of the trial, over the very strenuous objection of the plaintiff, I admitted, at the instance of the Defendant, in evidence, certain letters which had passed between lawyers and the Plaintiff took exceptions to my action in allowing those letters to go in before you as evidence.

In that connection, since the matter has been discussed pro and con here, I want to say to you that in admitting [fol. 365] the letters written by lawyers giving their opinions as to what the character of Plaintiff's services to defendant would be, were admitted only on the plea that they constituted a part of the contract referred to by them as a supplemental contract that was finally entered into between the parties.

They were not offered nor admitted on the theory that they could be considered as bearing upon the fact issues in the case. Those letters cannot be considered by you as bearing on the question whether plaintiff's services actually rendered to the defendant *was* in competition with common carriers, or that such service was substantially the same service as rendered by common carriers. Those letters, written by plaintiff's attorneys and the defendant's attorneys, and certain of defendant's agents shall not be considered by you for any purpose other than to aid you in arriving at and understanding of what the supplemental contract was which the parties finally entered into. The purpose of its introduction and the purpose of its admission was at the time limited to that and to be considered by you in arriving at an understanding of that contract; the contract is not so important, since you are not called upon to decide anything concerning that contract. There has been no issues submitted to you and will not be that calls upon you to make any findings as to that contract, because the legal questions are entirely for the Court, and the fact questions are for you, and any questions as to the illegality of that contract *is* for me of course to determine.

With these instructions, gentlemen, you may retire and consider of your verdict.

Most of this charge is written and some of it is oral. But the main thing you want are the two issues and they are written out for you.

You may retire, select your own Foreman and consider of your verdict.

[fol. 366] Mr. McKnight: May we take exceptions in the absence of the jury?

The Court: Yes, you may. You are waiving the rule that they must be made in the presence of the jury?

Mr. Morgan: Oh yes.

(The jury retired.)

DEFENDANT'S OBJECTIONS TO PORTION OF COURT'S CHARGE

Mr. McKnight: Defendant wishes to object to that part of the Court's charge wherein it places the burden of proof upon the Defendant to establish the negative of the two issues submitted by the Court to the jury, for the reason that the burden of proof should be placed upon the Plaintiff in this case to establish the affirmative of such issues, such issues being material and necessary to Plaintiff's cause of action, and the Court's charge is in error, such issues being material and necessary to plaintiff's cause of action, and the Court's charge is in error in placing the burden of the proof upon the Defendant to establish the negative of such issues, and each of them, and the defendant excepts to the Court's charge with respect to the burden of proof on each issue separately and both issues jointly; Defendant objects and excepts to so much of the Court's charge on the issue of competition as not included in the special requested instructions requested by the defendant for the reason that such charge places too onerous a burden upon defendant with respect to the issue of competition and is too narrow and limited in its scope and effect, and the defendant in this connection says that it requested a special charge or [fol. 367] special issue which is No. 1, I believe, in which it defines more fully the term "Competition". And says that such charge or the substance of such charge or the material elements of it should have been submitted to the jury, and defendant objects to the Court's failure to submit the material elements contained in said specially requested instructions to the jury, as a part of the Court's definition of competition.

Defendant likewise objects to that part of the Court's charge wherein the Court's charge withdrew from the consideration of the jury, in so far as the two issues submitted were concerned, the letters which were introduced in evidence by the Defendant, as its exhibits, one to six inclusive, respectively, and says that the limitation placed by the Court upon the jury's consideration of these letters was too limited and in the opinion of the defendant improper.

There are contained in such letters material statements of facts which are admissible in evidence as admissions against interests, under the circumstances here, and under the evidence in this record upon material facts, and that materially bear upon the issues and each of the issues submitted by the Court, and the Court's instruction to the jury depriving the defendant of having the jury consider the material statements of fact contained in such letters written by the plaintiff's attorneys with the consent and approval both expressly and impliedly, of the plaintiff in this case, and pursuant to that implied and expressed authority as shown by the evidence in this case, and the defendant is deprived by the Court's action in having the jury consider the statements contained in these letters, particularly those contained in Exhibits 1 and 5, and particularly defendant says that Exhibit 5 contains numerous statements of fact which are material.

The Court: Can you give me an example of some of those statements?

[fol. 368] Mr. McKnight: Yes, I will be glad to.

The Court: That you have in mind.

Mr. McKnight: I asked him about admissions generally I did not ask any limitation on them. I did not understand that you put any limitation on them.

The Court: As I recall, you stated that they were of such nature as to constitute a part of the contract?

Mr. McKnight: I told the Court that I thought they were admissible for the purpose of connecting the original and supplemental contracts to show that each was a part of the other, and likewise they were admissible for other reasons, which I thought was material. I do not know whether I expressed the other reasons.

The Court: I made those restrictions with the reference to that evidence clear, I was trying to make sure that I was not in error in admitting them, because counsel for

Plaintiff made very strenuous objections and of course if it had been raised—I do not think I would have ever have permitted those letters written by you all and swapping views between you preliminarily and leading up to, in the first place, the exceution of the contract, and in the next place the carrying on of these business operations, which as I understood took place after that, because I think if I had admitted them for that purpose it would have been error, at least here is what I had distinctly in mind, that I admitted them only on the theory that you [fol. 369] expressed at the time that they were of such nature—I not having read them—that you thought that they would constitute a part of the contract, because I was about to rule against you under the rule which you are familiar with that you cannot prove all of the conversations or letters leading up to the making of a contract, all of the conversations and letters finally being merged into the contract.

That the only thing you can offer then is the contract, and it is immaterial about the talk unless certain special issues are raised where at time they may be resorted to to give meaning to the contract.

Mr. McKnight: If the Court please, your limitations of the admission of the letters did—I did not understand such limitation was placed on them, if there was, I would have excepted to the limitation, by the Court, and I would like to reserve an exception at this time.

The Court: I am not saying I placed that limitation on them at the time they were admitted.

Mr. McKnight: I didn't think you did.

The Court: Now, that limitation was in my mind and it was submitted to me as I recall upon the theory that I have just discussed, and for that limited purpose and not for general purposes. The record will settle all that.

Mr. McKnight: The record will speak for itself, I could be mistaken. My recollection is you told the jury, I think they were admissible——

[fol. 370] The Court (Interrupting): I would limit them now, and you can have your exception, but as a curiosity I would like for you to recall back.

Mr. McKnight: I have before me, Exhibit 5, which is a letter dated April 11, 1941, from Mr. Christopher to L. B. Colfix, in which he says—I am not going to read the first part of the letter, because that does relate to statements

about what the tariff contains. He quotes a part of the statute, and that part of the statute which he does quote is material to a part of the issues submitted to the jury, and then he starts off, and he names the particular statute, and then he says:

"Of course you have not had any experience with the service of contract carriers, but you do anticipate that the service to be rendered under the contract which you propose to make will not be a service which will be in any respect "Substantially the same service" as is rendered by common carriers, for the simple reason that this contract carrier, if you enter into the contract and if the permit is approved, will devote all of his time and attention to exclusively and to no other member of the general public. The trucks which he operates will be dedicated to your service alone and will not be operated in the service of any other member of the general public."

The Court: There is no issue as to devoting his time exclusively, there is no difference about that here.

Mr. McKnight: It bears on the nature of the operations. Then he goes ahead—I will not read it unless the Court wants me to, but he points out different things that [fol. 371] he will do which will be different from all of the things that common carriers do.

The Court: But is it not true that was at a time before these operations had come in?

Mr. McKnight: That is correct, but you have admitted evidence that shows——

The Court (Interrupting): We have no information of what those operations were. I had not considered it, we have only the issue actually as to what the operations were during the time involved. If I am sitting here telling somebody about some operation that is going to happen six months or a year from now, that it is going to be so and so, could that be introduced on the trial to prove what the operation was. It proves what it was contemplated to be.

Mr. McKnight: What the evidence shows, is that the operations were in accordance with what they said they were going to be, and they say that is not substantially the same services. I think that is a fact of the matter which the jury is entitled to consider. I am not disposed to

argue the matter with the Court. I know the Court has ruled already, and we desire to reserve an exception to the Court's limitation. I will not undertake to pick out each sentence here unless you want me to.

The Court: No, I wanted to see what you had in mind. Now there are requested instructions which I have refused but have not signed, but I will sign them.

[fol. 372] Mr. McKnight: It will be understood that we reserve an exception to all of those that the Court refuses to give.

The Court: Yes.

Mr. McKnight: And that issue No. 1, on the question of competition.

The Court: Are there any exceptions for the Plaintiff?

Mr. Morgan: No, your Honor, we consistently just think there is no issue at all, that would be the only exception we have, the submission of any issue at all.

The Court: I know, whether you do or not, I know you except; I know what your idea is that it should not be submitted to the jury.

Mr. Morgan: It has been our position consistently and still is that we except to the submission of any issues to the jury by the Court for the reason that we think there *is* no fact issues to be determined, and that the Defendant failed completely to raise any fact issue and that it is strictly a matter of law, and no question of fact which should be submitted or considered by the jury.

Mr. McKnight: In my exception, if the Court please, on the question of limitation, and the jury's consideration of the letters, I want to add the further exception that after the letters were introduced the Plaintiff himself and [fol. 373] the Attorneys joined issue on the letters and showed they were not relied upon by the Defendant, and otherwise treated the letters in such a way that they did become, if they had not already become, admissible for all purposes.

(After the jury retired and were out a while, they sent in a request, and the Court and the Attorneys were in the Court room in the absence of the jury when the request came.)

Mr. McKnight: The Court is sending out to the jury, in response to a request of the Jury, Exhibit No. 5, and also tariff 1-A (sending the whole tariff book) with the part

marked, that is, the particular part that is applicable, and we except to the action of the Court because we do not think the action is in compliance with the Jury's request, and we think it will tend to confuse the jury and prejudice the Defendant. There are lots of things in that tariff that have not been introduced in evidence, and we think to allow the jury to take that out would be misleading and would be confusing.

The Court: The request made by the jury is as follows: "Please send tariff transportation and contract of carrier" and I am sending out these two exhibits.

Mr. Morgan: I understand you are limiting that to the first paragraph of No. 600 in the tariffs and Exhibit No. 5, as introduced by Plaintiff.

Mr. McKnight: But the whole book goes to the jury.

[fol. 374] (Later the jury came in and announced they had a verdict.)

The Court: Gentlemen have you a verdict?

The Foreman: Yes, sir.

The Court: All right, give the verdict to the clerk.

(The clerk handed the verdict to the Court.)

The answers to both questions are "No."

Gentlemen now I suppose you will have a motion for judgment on the verdict. So gentleman of the jury, I will excuse you until ten o'clock in the morning and you will be finally excused pretty soon after ten, because whatever verdict you will render will be an instructed verdict. So you are excused until ten in the morning.

(The jury left the Court room.)

Mr. McKnight: The defendant wishes at this time to move the Court that judgment be entered in its favor on the verdict of the jury. I do not think it is necessary to state my reasons; the Court understands them.

Mr. Morgan: I am not familiar with that, is the verdict to the effect that the service was not in competition and was not substantially the same?

The Court: Yes.

[fol. 375] Mr. Morgan: We renew our motion as heretofore to instruct the jury for plaintiff, regardless of what the jury may or may not have done. That has been our position all the way through, and we now move the Court to

instruct the jury for the Plaintiff or render his judgment notwithstanding the verdict of the jury. I think you can do it either way.

The Court: I will pass on it in the morning whichever way I handle it.

Mr. McKnight: Whatever is necessary to file will be considered as filed.

The Court: Yes.

The Court will adjourn until ten o'clock in the morning.

Morning Session December 15, 1944

(Court met pursuant to adjournment, with the jury in the box, and following proceedings were had:)

(The Court gave to the jury a peremptory instruction as follows:)

PEREMPTORY INSTRUCTION OF THE COURT

Gentlemen of the jury, it looks like we are making slow speed in this case, but I doubt if you realize the importance of it. Most of the time we have spent in the trial of the case, you have been on the outside of the [fol. 376] Courtroom, and many important proceedings have gone on during your absence.

The great importance of this case, as I view it, is because the questions here are affected with a public interest, and a very great public interest. That is true because freight rate discriminations are involved.

I do not suppose any of you are old enough to remember, but I do, back in the eighties, when I was not so very old, Governor Hogg was stirring up the whole state of Texas over this same question of one favored shipper being able, by procuring freight rate reductions, to put his competitors out of business.

A big shipper, if he was able to constantly affect a reduction in his freight rates could put his competitors, certainly all of the little fellows, out of business. A man must get business to stay in business, and he ordinarily can not stay unless he can compete in prices.

Finally we had a constitutional amendment which authorized the legislature to pass laws governing the railroads in this regard. It passed laws prohibiting such dis-

criminations. Railroads were the only common carriers then.

The whole purpose of it was to stop this evil I have pointed out to you. That law, as I recall, finally got on the statute books in the latter part of the eighties and the first part of the nineties. Of course at that time we had no automobiles. They were being thought of, and in a few years, we had some one cylinder cars.

So, in the first amendment to the constitution, as I recall motor carriers were not included nor were its words sufficiently broad to include them. Therefore, another amendment to the constitution, with the same object in view, was submitted to the people, which would give the state the power to fix the rates to be charged by motor carriers where they were in compeition with common carriers. [fol. 377] Laws followed that amendment regulating motor carriers. Then came on contract motor carriers which in cases were effecting the old evil of freight discriminations without a law to regulate them. So the legislature of Texas took up that matter, and as I recall, without any constitutional amendment, put into effect the laws that we are considering here.

That law does not undertake to assume jurisdiction over motor contract carriers, unless the nature of their work puts them in competition with common carriers, and where they render in substance, not identically, the same kind of service, as common carriers.

These laws, material to be considered here, are Articles 911b of Section 3, etc., as follows:

"No motor carrier shall after this act goes into effect operate as a contract carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act."

And Section 4A of this article provides:

"The Commission is hereby vested with power and authority, and it is hereby made its duty, to supervise and regulate the transportation of properties for compensation or hire by motor vehicle on any public highway in this state, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier" etc.

In addition to the public interests, because of rate discrimination, it will be obvious to you that the public, in view of our present system of highways, and the extensive use of them by the people is extremely interested in the regulation and supervision of these highways by the State. Some people set themselves up in business, using these [fol. 378] highways as their exclusive place of business. In considering the safety factor to the people, who pay for these roads, you see what I mean, when I tell you in the outset that the questions here are affected by a very deep public concern.

The next section of that article, and a very important one, is this:

"The Commission is hereby vested with the power and authority, and it is hereby made its duty to prescribe rules and regulations covering the operations of contract carriers in competition with common carriers over the highways of this state, and the commission shall prescribe minimum rates, fares, and charges to be collected by such contract carriers, or substantially the same service."

Here is another section, 20, of that article, which is a little more important, as bearing upon the course that the Court here should take, as I view it, and it reads:

"If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act or regulation, adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the commission, may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations or to either or all of them in the District Court of Travis County, Texas, against this Commission as defendant."

Now, the plaintiff has raised the point all the way through and it has been elaborately and ably discussed, that you and I have no jurisdiction over this matter; that this Court has no power, no authority to try out this attack the defendant originally makes in this Court on the rates fixed by the Commission to govern it as such a contract carrier in hauling for the defendant.

[fol. 379] The jurisdiction of this Court is challenged by plaintiff because the statute has not been followed; that it

should have been filed in the District Court of Travis County. Defendant says such rates so fixed are not binding on these parties. Plaintiff says there is a collateral attack and condemned by the laws of Texas. Any attack on a rate, other than by a suit filed for the direct purpose of setting aside the rate is a collateral attack.

I hold the attack here upon such rates so fixed by the Commission is typical of collateral attacks, and that such collateral attack is condemned by both statutes and by the decisions of the Courts of Texas.

This suit as made by the Plaintiff is an ordinary undercharge suit, a suit for underpayment of freight rates, declaring that some freight has been paid but not according to the lawful rates as fixed by the Railroad Commission of Texas.

The attack upon the rates fixed by the Commission arises as a defense to plaintiff's suit. Plaintiff sues for the rates as fixed by the Commission. The defense is that such rates so fixed by the Commission were illegal; that the hauling done by the plaintiff was not in competition with common carriers and that he was not rendering substantially the same serv-e as common carriers; that therefore, the Commission of Texas was acting outside and beyond its authority, and the rates fixed by it were therefore invalid. Defendant also pleads that the contract privately entered into between the parties, subsequent to the Commission's action in fixing the rate, was binding upon the parties and must solely be looked to by the parties for the charges that can legally be made by plaintiff for this hauling.

That is exactly what we have here in the defendant's defense. Now here is the trouble with the defense offered by the defendant:

First, such a defense could not prevail, if this suit had been filed in the State District Court in Travis County, [fol. 380] at Austin, Texas. The Defendant might get such a defense heard by a District Court there if first filed in the form of an application with the Commission. In its administrative capacity, it might have acted upon it favorably, but such a defense or suit under the statute, as an original matter, could not prevail in the District Court of Travis County.

The Commission, on plaintiff's application, heard these parties, both the plaintiff and the defendant, heard their

witnesses as to the nature of the hauling that this plaintiff was going to do for defendant. They found that plaintiff's work was to be in competition with common carriers and that he was going to render substantially the same service as common carriers. They did not say that in so many words, but they fixed the rates to be charged by plaintiff and paid by defendant at the minimum rate charged by common carriers. Their act in fixing such rates for this private contract carrier would have been illegal if they had not first satisfied themselves that plaintiff's services for defendant were to be in competition with common carriers, and that his services were to be substantially the same as common carriers. In the absence of proof to the contrary, and such proof is not here, I must assume that the Commission performed its lawful duty; that the rates fixed by it were legal and that means in accordance with the laws of Texas.

Federal Courts primarily are to administer the laws passed by Congress, authorized by the United States Constitution. It may, however, administer state laws, and does at times. Here, only State laws are involved. This Court is bound by such laws, as construed, not by the United States Courts, but by the Courts of Texas, and that limitation is likewise applicable to the Supreme Court of the United States.

The acts of the Commission in fixing these rates are conclusively binding upon the parties unless relief is had, as the statutes provide.

[fol. 381] In the case of Railroad Commission vs. Uvalde Construction Company, 49, S. W. (2d), 1115, one of the Courts of Civil Appeals of Texas said this; and what they said was later approved by the Supreme Court of this State:

"We sustain appellant's contention. It has been repeatedly held, and is not controverted by appellee, that fixing freight rates is a legislative or quasi legislative function, vested exclusively in the Railroad Commission."

And the Supreme Court, in the case of Grand Trunk Western Railroad Company vs. the Railway Commission of Indiana, 221, U. S. Reports Page 403, had this to say:

"Observing first, that the order is a legislative act by an instrumentality of the State exercising delegated au-

thority, is of the same force as if made by the Legislature, and so is a law of the state within the meaning of the contract clause of the constitution." Citing numerous authorities.

In other words, the Commission, when acting and exercising its rate making power, is acting in a legislative capacity, passing laws for you and for me.

Now, here is why this defendant could not win on the defense offered here, even if suit was in the District Court of Travis County, Texas, and even if it established its defense with the character of evidence introduced here. The order of the Commission in fixing those rates was regular on its face. This is denied but there is no serious contention here to the contrary and could not be. It is in all respects regular on its face, whether the defendant formally admits it or not. Likewise the defendant does not contend that the order is invalid, for the reason that the rates fixed by the Commission were unreasonable and unjust. Now, if we were in a hearing in the District Court of Travis County, with the defense defendant pre- [fol. 382] sents here, here is the law that would govern in that proceeding:

"In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency"—

and I must digress here to say that the Railroad Commission of Texas has more different power phases, more different capacities as held by the Courts than most governmental agencies that I know of. It is held to exercise legislative functions, judicial functions, and administrative functions.

"In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time this order was entered by the agency there then existed sufficient facts to justify the same. Whether the agency heard sufficient evidence is not material."

That being so, the defendant in the Travis County District Court, in order to go behind the Commission's order, would have to claim that the Commission in fixing these

rates acted without authority and beyond its jurisdiction for the reason that it was shown before the Commission on the hearing of the application that the services to be performed by the plaintiff for defendant were not to be in competition with common carriers, and substantially the same services. It would not be sufficient to invalidate the Commission's orders, on such a trial in the District Court, to show that, in actual operation, the services performed were not in competition with common carriers, as they have undertaken to show here, and that the service was not substantially the same; and that subsequent to the commission's fixing the rates the parties fixed up a contract between themselves, whereby all the Commis- [fol. 383] sion's rates were to be set aside and ignored and an expense, plus 10%, standard was fixed as the rate of pay for plaintiff's services. That kind of a showing, the one made here, would merely show the illegality of their own acts. In other words, that these two parties, not the Commission, acted beyond their authority.

On the other hand, if the defendant admitted in such a trial, or if it was shown that, on the hearing of plaintiff's application, the evidence was that the services of plaintiff for defendant were to be such as to make him in competition with common carriers, and the service substantially the same, such would be an admission of the jurisdiction and power of the Commission to fix the rates and make them conclusively binding on the parties.

Now, in such a proceeding limited to the defense of showing there was no evidence, or not sufficient evidence, before the Commission to show the services of plaintiff were to be in competition with common carriers, let us surmise what this evidence before the commission actually was, and to what effect.

Neither party here undertook to show in detail what it was, but relied more on the face of the Commission's order itself. The evidence does show that these parties entered into a plan at Oklahoma City before coming down to Texas. In substance it was that, plaintiff was to get a permit from the Texas Commission as a private contract carrier and get rates fixed by the Commission. In other words get themselves set up, with an appearance of regularity and legality, but in truth with the design to ultimately effect a reduction of defendant's freight rates.

The evidence shows that plaintiff was at Austin, and that the agents of the defendant were there with him on the application. They could not get what they went after there unless they showed plaintiff's services were to be in competition with common carriers.

Would you not suppose they spent their time trying to show the essentials to success? Do you suppose they tried [fol. 384] to show facts that would get their application granted, or those that would defeat it? Do you suppose they spent all of their time down there trying to show the Commission that plaintiff's services were not to be in competition with common carriers, as defendant has here? Or that his services were not to be substantially like those rendered by common carriers as they have here? I am talking about both of them. I am talking about the scheme for legality, the rate scheme, from its origin in Oklahoma City.

The answer is, they got what they went after, the application granted and the minimum rates fixed by the Commission. That order being regular on its face, it is conclusively presumed that the Commission acted lawfully, entirely within its jurisdiction. In order for that to be so, it had to be shown by these parties that the service was to be in competition with common carriers, and the service substantially the same, or the Commission had to believe that the facts were in existence to show that.

Therefore, I reiterate that if defendant had offered its defense presented here, even in the District Court of Travis County, the only Court in Texas that could try it, its defense would have failed, as it must fail here.

And this defense must fail here for another and better reason, and that is that this Court has no jurisdiction to entertain or hear such defense as defendant has offered here, for the reason that such a defense constitutes a collateral attack upon the rates of the Commission.

I read again Section 20 of Article 911b of the Texas Statutes:

"If any motor carrier or other party of interest be dissatisfied with any decision, rate, charge, rule, order, act or regulation adopted by the commission, such dissatisfied person association, corporation, or party after failing to get relief from the Commission may file a petition setting

[fol. 385] forth the particular objection to such decision, rate, charge, rule, order or regulations or to either or all of them in the District Court in Travis County, Texas, against this Commission as defendant." The litigation there terminates according to the facts and the law.

Now, here is a decision by the Supreme Court in the case of Texas Steel Company versus Ft. Worth & Denver, 40 S. W. (2d) 78. What is said by the Texas Court controls this one. They said in that case:

"The suit, in so far as it involves the above orders of the Texas Railroad Commission, is based upon the theory and contention that the above orders are absolutely and totally void for the several reasons set out in 'Question No. 1' propounded in the certificate from the Court of Civil Appeals. We overrule these contentions.

"It is the settled law of this state that the Railroad Commission is a quasi judicial body.

"Since the Railroad Commission is a quasi judicial body it follows that an order regular on its face, made by the Commission, is not subject to collateral attacks." Citing many authorities. And then:

"We think that a casual reading of the certificate will demonstrate that the orders of the Commission here attacked as null and void are regular on their case. All the grounds urged to nullify this order requires the Court to go behind them to ascertain the facts, and do not appear on the face of such orders. It has long been settled in this state that such an attack is collateral."

That is a perfect photograph of what we have here. The defendant wanted, and I have permitted it in its evidence, to go behind the Commission's order.

That case further holds:

[fol. 386] "If an order of the Commission, regular on its face can be collaterally attacked on the ground of want of notice or any other ground here urged, then the orders and rates of the Commission could be rendered null and void in a proceeding in which the Commission was never given an opportunity to be heard either on the facts or the law. Furthermore, different Courts might reach conflicting conclusions as to the facts involved in the same order. This demonstrates the wisdom of the statutes and

the correctness of the rule here announced. The legislature recognized in the beginning that to allow such attacks would lead to intolerable results, and foreclose the right to do so by the statute prescribing the manner and the course in which the rules and rates of the Commission can be subjected to judicial review.

At this point we wish to state that we do not want to be understood as holding that we would hold these orders illegal in a direct proceeding. We do not pass on that matter, as we have no such proceeding here. What we do hold is that the orders here attacked are not subject to be called in question except in a proceeding brought in full conformity with the provisions of Article 6453 Supra."

Now, the Commission is not a party to this suit. The defendant would have us try and render judgment against it, in its absence. It has a right to be heard. Any other course could only result in its destruction.

What do the Courts of Texas, including the Texas Supreme Court say about the right of the defendant to make such an attack upon the Commission as it is making here? The case I just read to you tells us. There are many of them, but I will not take the time to quote from only a few of them.

In the case of the Alpha Petroleum Company vs. Terrell, 59 S. W. (2d) 364, the Court on this subject said this:

[fol. 387] "Under the plain terms of the above quoted statute, we are compelled to hold that any suit which seeks to annul, modify, or set aside any rule of the Commission valid on its face, promulgated by authority of the terms of Chapter 26, Section 15, Vernon's Annotated Civil Statutes, Art. 6029, must be brought in the District Court of Travis County, Texas, and that this requirement is one of jurisdiction and not a mere question of venue. We further hold that if the rule is one utterly void on its face, it may be attacked in any Court otherwise having jurisdiction of the case.

We finally hold, however, that if it requires evidence to show the invalidity of the rule, it is not void on its face, and is not subject to collateral attack or to attack in any Court, except a District Court of Travis County.

"In announcing the above rule, we wish to expressly state that we do not hold that it lies within the power of

the legislature to, by statute, take away the constitutional jurisdiction of District Courts. What we hold is that, where the suit is to enforce a right, which exists only by operation of the statute, and not under the constitution, or the common law, it does lie within the power of the legislature to designate a particular Court as an exclusive tribunal to hear and determine such suits.

In such a case where the statute, as this one does, provides that the suit shall be filed in a particular Court, it demonstrates a conclusive legislative intent to designate such Court as the only tribunal where such matters can be litigated, and, as said by our Supreme Court, speaking through Judge Cureton, in Mingus vs. Wadley, 115 Texas 551, 285 S. W. 1084, 1086: 'In Special Proceedings not within comon law jurisdiction, the Court's statutory designation of the venue is mandatory and jurisdictional.'"

On this subject the Supreme Court of the United States [fol. 388] in Burford vs. Sun Oil Company, Vol. 87, Page 999, Law Edition, also had something to say as follows:

"If an order of the commission lawful on its face can be collaterally attacked in the various Courts and counties of the state on grounds such as those heard in the instant case, interminable confusion would result.

"To permit various state Courts to pass upon the Commission's rule and order, 'would lead to intollerable confusion. If all district Courts of this state had jurisdiction of such matters, different Courts of equal dignity might reach different and conflicting conclusions as to the same rule. Manifestly the jurisdictional provision under discussion was incorporated in the act for the express purpose of avoiding such confusion.' Time and experience, say the Texas Courts, have shown the wisdom of this rule."

Therefore defendant's defense and only defense as offered here cannot be entertained, and since no other defense is offered, gentlemen of the jury, you are instructed to find a verdict for plaintiff in the amount sued for.

In doing so, I am acting favorably on a motion made by plaintiff some days ago, and in your absence. In other words, both parties made motions for me to instruct the jury the verdict to render in this case. I heard them, and at the conclusion of the evidence I took those under advisement, and it is now the plaintiff's motion made at that time that I am granting.

Now, it has not been such a difficult case, but it has been a most interesting one and a great deal of interest has been added to it by your verdict. Your verdict is on the assumption that the supplemental contract the parties entered into, after the Commission fixed the rates was valid. You were not charged as to that supplemental contract. I did not tell you whether it was valid or invalid.

[fol. 389] I tell you now it is not only invalid, but is contrary to the criminal laws of this state. In other words, they would be subject to prosecution in a criminal Court for working under that contract. Emphasizing the importance and far reaching effect of your verdict I call your attention to this very obvious result, that it would allow this defendant, General Mills in this comparatively little transaction to get a freight rebate or freight reduction of approximately $33,000.00. So it will be obvious to you gentlemen that there would be nothing wrong in requiring the defendant to pay the same rates that their competitors on all like shipments are required to pay. You may have annually a carload of cattle. One of you may have annually a carload of sheep; another big fellow might ship a separate carload a day for 365 days in the year, yet you have just as much right to live, in business, as that big fellow. It is the law, and its purpose, that when you go to get freight rates on your one load that you not be discriminated against in favor of the big shipper.

It is the intention of the law that when you go there you are just as big as the biggest fellow in business as to the rates on your one carload of sheep once a year as he gets every day of the 365 days in the year on the individual carload lots that he ships. That is in plain language and the real purpose of these laws.

But I am not going to set your verdict aside, but will let it stand, to be considered and accepted by the higher Court, if they so desire.

Now, gentlemen, I have had these views, the views that I have here expressed, about the law questions, some time. Not quite so definitely as now, but in order to have one appeal in this case, settle the whole thing, I have ruled on various motions made by the attorneys with the objective of getting exactly what I have. Let the evidence be introduced, all the evidence they wanted to introduce, heard by a jury, and get a jury verdict. Now they have a complete record and can go up.

[fol. 390] If defendant is right on the law, the Court will say so, and if I am right, or the plaintiff is, the higher Courts will say so. So, regardless of your verdict, I have accomplished the purpose I had all along in not deciding this case merely on the pleadings, but to bring it to the very situation that we are in now.

Of course, I have the power, it might not be right, to set your verdict aside; but as indicated, I am not going to do it. Frankly, I am afraid I confused you by permitting you to have before you such evidence as those letters passed between lawyers, in which legal opinions were expressed. I permitted them on one presented theory, and they were used on entirely a different theory. I did not specially try to weigh that testimony before or when I submitted it to you. I left that to you. I did not listen much to the lawyers because I was thinking about this instructed verdict and special issues etc. I have thought about it quite a bit since you reached your verdict. One of the lawyers for the plaintiff in one of those letters introduced expressed the legal view that this plaintiff, since he would exclusively haul for this defendant, and since what he did haul would come to him under the supplemenal contract and arrangement, that he, plaintiff, would not be in competition with anybody. Well, that is an erroneous view of the law of course. A competitor in business does not cease to be a competitor because he just gets all of the business of a particular shipper. He just gets to be a real competitor when he goes to getting it all or all of a class from a particular shipper.

Suppose we assume here that this firm would give all of its business to some common carrier like Sproles, and that the business was enough to use all of the trucks that Sproles had, under the view expressed in that letter, Sproles would not have any competition. Well that is a new idea. That is not the meaning of the law.

This plaintiff did enough business that his freight charges amounted to $77,000.00. Just what was the value of the [fol. 391] goods he hauled, I do not know. It must have gone into probably hundreds of thousands. Compare the value of a bushel of wheat to the freight charge. But that is not really a fair example, as to freight charges for getting it to the market, because freight on wheat compared to its value, is out of line with many other commodities. In any event you can see what a business this plaintiff engaged in.

It is difficult for me to see that there is any serious controversy here about this plaintiff being in competition with common carriers, or that he rendered substantially the same service as common carriers.

The testimony of Mr. Sproles is not disputed, no attack upon that. Under the testimony of the defendant, taken as a whole, I mean, in the light of the law, not in the light of the law as the lawyers stated it in that letter, they were both in this conspiracy, shows competition with common carriers, and a similar service.

If they accused each other here, it is just the pot calling the kettle black. I think I sense the motive that prompted you, the motive of making plaintiff stand by his contract. I sympathize with you in that. If I had legal authority to make these men, if it affected only them, live up to the contract they solemnly entered into, I would make them live up to it. But I do not think we have such right. And we come back to the proposition that it is no hardship on General Mills to have to pay the same freight you pay and I pay and everybody pays. That is the milk in the coconut in this case.

If your verdict stands, this defendant gets off with about $33,000.00 reduction in his freight rates.

Gentlemen of the jury, I am not setting your verdict aside. You are entitled to your views the same as I am to mine, just a difference of opinion. But regardless of the verdict, you will be instructed to find for the plaintiff under the facts and the law of the case.

[fol. 392] Mr. McKnight: I do not think it necessary for the jury to return another verdict.

Mr. Morgan: We think they should prepare another verdict.

Mr. McKnight: We except to that, and we want the record to show that the request has just been submitted to the Court this morning.

The Court: They did not make a request, I decided to do it myself; I am not acting on any request.

Mr. McKnight: He presented a request for an instructed verdict; I do not know that it makes any difference one way or the other, but I want the record to show that it had just been presented here as a motion.

The Court: All right. The Clerk will prepare a form of verdict for the amount sued for and one of you gentlemen (referring to the jury) will sign the verdict.

(Which was done.)

(See jury's verdict on file in the Clerk's office.)

Mr. McKnight: It is understood that the defendant reserves an exception to the procedure here this morning.

The Court: Oh, yes.

[fol. 393] Mr. McKnight: I assume the Court's ruling disposes of the motions of the defendant also, that you had under advisement.

The Court: Yes, they will be overruled.

Mr. McKnight: There are two or three motions and the Court has them under advisement.

The Court: Yes, they will be overruled.

Mr. Morgan: Shall we prepare an order and submit it to counsel and then bring it to the Court?

The Court: Yes.

* * * * * * *

[fol. 394] We, attorneys of record for plaintiff and defendant, agree that the above and foregoing is a true and correct transcript of proceedings had on the trial of the above entitled cause before Honorable James C. Wilson, United States District Judge, with a jury, beginning on December 11, 1944, and ending on December 15, 1944.

This the 7th day of January, A. D. 1945.

Culbertson, Morgan, Christopher & Bailey, By Cecil A. Morgan, Attorneys for Plaintiff., Fort Worth, Texas. Miley, Hoffman, France & Johnson, Oklahoma City, Oklahoma. Cantey, Hanger, McMahon, McKnight & Johnson, By Alfred McKnight, Attorneys for Defendant, Fort Worth, Texas.

The above and foregoing reporter's transcript is hereby approved as a true and correct transcript of the proceedings had on the trial of the above numbered and entitled cause, beginning on December 11, 1944, and ending on December 15, 1944.

This the 7th day of January, A. D., 1945.

James C. Wilson, United States District Judge.

[fol. 395] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL TO CIRCUIT COURT OF APPEALS—Filed January 8, 1945

[Title omitted]

General Mills, Inc., defendant in the above entitled cause, pursuant to Rule 75(d), files the following statement of points on which it intends to rely on the appeal to the Circuit Court of Appeals for the Fifth Circuit:

1

The trial Court erred in denying the motion of defendant for a directed verdict presented at the conclusion of the plaintiff's evidence.

2

The trial Court erred in denying the motion of defendant for a directed verdict presented at the conclusion of all the evidence.

3

The trial Court erred in denying the motion of defendant for a judgment upon the special verdict of the jury, consisting of their answers to the special issues submitted by the Court.

4

The trial Court erred in sustaining the motion of the plaintiff for a directed verdict and instructing the jury to return a verdict for the plaintiff.

[fol. 396] 5

The trial Court erred in instructions given to the jury and oral opinion rendered in connection therewith after the return of the jury's special verdict.

6

The trial Court erred in refusing to give effect to the findings of the jury upon the special issues submitted by the Court, which findings constituted the jury's special verdict.

7

The trial Court erred in rendering judgment for the plaintiff.

8

The trial Court erred in failing to render judgment for the defendant.

9

The Trial Court erred in overruling defendant's motion to strike plaintiff's amended complaint or in the alternative to require plaintiff to make certain allegations more definite and specific, such order having been entered under date of April 20, 1944.

10

The trial Court erred in excluding from the evidence defendant's offered Exhibit 10.

[fol. 397]

11

The trial Court erred in excluding competent testimony offered by defendant from the witness, Frank H. Cross, with respect to well known requirements of defendant in the transportation and delivery of its commodities.

12

The trial Court erred in his charge upon the burden of proof.

13

The trial Court erred in refusing to afford defendant the right to open and close the argument before the jury.

14

The trial Court erred in rendering judgment for the plaintiff upon so much of his claim as is barred by the two-year Texas statute of limitations.

15

The trial Court erred in refusing to give in charge to the jury defendant's Requested Instruction No. 1.

16

The trial Court erred in his charge to the jury on December 14, 1944, in withdrawing from the jury's consideration upon the issues submitted defendant's Exhibits 1, 2, 3, 4, 5 and 6, and each of them.

[fol. 398] 17

The trial Courts definition of the term "competition" given in his charge to the jury on December 14, 1944, was too narrow and placed too onerous a burden upon defendant.

18

The trial Court erred in excluding competent testimony of the witness, Frank Cross, with respect to the development of the distribution problems in the milling business over a period of years, including the requirements in connection therewith and the distribution methods of other milling companies.

19

The trial Court erred in filing Findings of Fact.

20

The trial Court erred in filing Findings of Fact upon issues submitted to and found by the jury in their special verdict.

21

The trial Court erred in each of his Findings of Fact.

22

The trial Court erred in filing Conclusions of Law.

23

The trial Court erred in each of his Conclusions of Law.

[fol. 399] 24

The trial Court erred in Conclusion of Law No. 6 which in effect constituted a fact finding upon issues submitted to the jury and contrary to the jury's special veredict thereon.

The trial Court erred in finding of fact No. 10 which is a finding on issues submitted to jury and is contrary to the jury's special verdict.

Respectfully submitted, Miley, Hoffman, France & Johnson, By Charles E. France, First National Bank Building, Oklahoma City, Oklahoma. Cantey, Hanger, McMahon, McKnight & Johnson, By Alfred McKnight, Attorneys for the Defendant, General Mills, Inc., Sinclair Building, Fort Worth, Texas.

Fort Worth, Texas, January 8, 1945.

Received this date true and correct copy of the above and foregoing Statement of Points on Appeal of defendant.

Culbertson, Morgan, Christopher & Bailey, By Cecil A. Morgan, Attorneys for Plaintiff.

[fol. 400] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE IN THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT—Filed February 5, 1945.

[Title omitted]

After due notice came on for hearing on this day the motion of defendant, General Mills, Inc., appellant in this cause, for an extension of time for filing the record on appeal with the clerk of the United States Circuit Court of Appeals for the Fifth Circuit and the docketing of the action in such Court. The Court finds the motion is well taken and should be granted.

It is Accordingly Ordered that the time in which the record on appeal in this cause may be filed with and the action docketed in the United States Circuit Court of Appeals for the Fifth Circuit be and is hereby extended to and including April 1, 1945.

Done in Open Court, this February 5, 1945.

James C. Wilson, United States District Judge.

Approved. T. S. Christopher, Atty. for Pltf.

[fol. 401] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL ON BEHALF OF GENERAL MILLS, INC., DEFENDANT IN THE ABOVE ENTITLED CAUSE—Filed January 8, 1945.

[Title omitted]

The defendant, General Mills, Inc., pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, designates the following portions of the record and proceedings in the above cause be contained in the record on appeal as follows:

1. Stipulation of attorneys with respect to filing dates of original complaint and original answer, plaintiff's demand for admissions and defendant's reply.

2. The first original amended bill of complaint filed on February 25, 1944, less exhibits attached thereto which are otherwise contained in the record. Exhibits A, B, C, D and E are plaintiff's Exhibits 1, 2, 3, 4 and 5, respectively, of the reporter's transcript. Exhibit F is Exhibit 6 of the reporter's transcript and is being transmitted in its original form by order of the Court under Subdivision (e) of Rule 75.

3. Order of the Court dated March 13, 1944, granting defendant leave to file motion to strike plaintiff's first amended complaint and for a more definite statement.

4. Motion of defendant, General Mills, Inc., to strike plaintiff's first amended complaint or to require plaintiff to make more definite and certain allegations therein contained filed March 13, 1944.

[fol. 402] 5. Memorandum opinion of the Court dated April 13, 1944, and filed on the same date upon defendant's motion to strike or to make more definite certain allegations.

6. Order of the Court dated April 20, 1944, filed on the same date, upon defendant's motion to strike plaintiff's amended petition or to make more definite and certain allegations therein contained.

7. Defendant's first amended answer filed on November 30, 1944. Omit Exhibit 3 to the answer with the state-

ment that such exhibit is omitted because copied into the reporter's transcript as defendant's Exhibit No. 8. Omit Exhibits 4, 5, 6, 7 and 8, with the statement that such exhibits are omitted because they are contained in the reporter's transcript as defendant's Exhibits 1, 2, 3, 4 and 5, respectively.

8. Defendant's Specially Requested Issue No. 1 filed December 14, 1944, and given by the Court, together with the jury's answer thereto, and the foreman's signature, constituting a part of the jury's special verdict.

9. Special Issue No. 2 of the Court, filed on December 14, 1944, and given by the Court to the jury, together with the jury's answer thereto and the foreman's signature, constituting a part of the jury's special verdict.

10. Defendant's Specially Requested Instruction No. 2 given by the Court to the jury, together with the Court's certificate thereto, filed on December 14, 1944.

11. Charge of the Court to the jury on the burden of proof, filed December 14, 1944.

12. Defendant's Requested Instruction No. 1, refused by the Court and filed on December 14, 1944, together with the Court's certificate of refusal.

13. Defendant's Requested Instruction No. 3, refused by the Court, and filed December 14, 1944, together with the Court's certificate of refusal.

[fol. 463] 14. The Court's peremptory instruction to the jury, filed December 15, 1944, and the jury's directed verdict.

15. Judgment entered by the Court under date of December 26, 1944, and actually filed December 27, 1944.

16. Supersedeas bond filed by the defendant on the 8th day of January, 1945.

17. Notice of appeal of the defendant filed on the 8th day of January, 1945.

18. Order of the Court directing that plaintiff's Exhibit 6 and defendant's Exhibit 9 be certified and forwarded to the Circuit Court of Appeals for the Fifth Circuit in their original form.

19. Reporter's complete transcript of trial proceedings from December 11, 1944, to December 15, 1944, including plaintiff's Exhibits 1, 2, 3, 4, 5, 7, 8 and 9, and defendant's Exhibits 1, 2, 3, 4, 5, 6, 8 and 9, and defendant's offered Exhibit No. 10.

20. Statement of points on which defendant intends to rely on appeal.

21. Designation of contents of record on appeal.

This the 8th day of January, A. D. 1945.

Miley, Hoffman, France & Johnson, by Charles E. France, First National Bank Building, Oklahoma City, Oklahoma.

Cantey, Hanger, McMahon, McKnight & Johnson, By Alfred McKnight, Attorneys for the Defendant, General Mills, Inc., Sinclair Building, Fort Worth, Texas.

[fol. 404] A true and correct copy of the above and foregoing designation of record was served on the undersigned, attorneys of record for plaintiff, on the 8th day of January, A. D. 1945, and receipt is hereby acknowledged and further service waived.

Culbertson, Morgan, Christopher & Bailey, By Cecil A. Morgan, Attorneys for Plaintiff, Leo H. Steele.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL ON BEHALF OF LEO H. STEELE, PLAINTIFF IN THE ABOVE ENTITLED CAUSE—Filed January 18, 1945.

[Title omitted]

The plaintiff, Leo H. Steele, was served by the defendant, General Mills, Inc., with a designation of the portions of the record, proceedings and evidence that the defendant desired to be contained in the record on appeal on the 8th day of January, 1945. Said plaintiff pursuant to Rule 75(a) and within ten days after it having been served by the defendant designates the additional portions of the

record, proceedings and evidence to be included in the record on appeal as follows:

(1) The plaintiff's motion for Summary Judgment together with the affidavit attached thereto which was filed on the 6th day of May, 1944.

(2) Plaintiff's motion for findings of fact and conclusions of law filed on the 23rd day of December, 1944.

[fol. 405] (3) Findings of fact and conclusions of law.

(4) Designation of contents of record on appeal.

Culbertson, Morgan, Christopher & Bailey. By Cecil A. Morgan.

Dated this the 15th day of January, 1945.

A true and correct copy of the above and foregoing designation of record was served on the undersigned, attorney of record for defendant on this 18 day of January, 1945, and receipt is hereby acknowledged and further service waived.

Cantey, Hanger, McMahon, McKnight & Johnson, (Signed) By Alfred McKnight.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL ON BEHALF OF GENERAL MILLS, INC., DEFENDANT IN THE ABOVE ENTITLED AND NUMBERED CAUSE—Filed January 18, 1945

[Title omitted]

Defendant, General Mills, Inc., having been served with a designation of contents of record on behalf of Leo H. Steele, plaintiff herein, files this supplemental designation on its own behalf.

1. Order dated May 15, 1944, postponing time in which defendant might file opposing affidavits.

[fol. 406] 2. Defendant's submission of opposing affidavits to plaintiff's motion for summary judgment, filed June 15, 1944, and the affidavits of Frank H. Cross and L. B. Colfix annexed thereto.

3. Defendant's objections to the Court's Findings of Fact and Conclusions of Law and the Court's certificate annexed thereto.

January 18th, A. D. 1945.

Miley, Hoffman, France & Johnson, Oklahoma City, Oklahoma. Cantey, Hanger, McMahon, McKnight && Johnson, By Alfred McKnight, Attorneys for the Defendant, Fort Worth, Texas.

1-18-1945.

Received copy of above this date.

Cecil A. Morgan, Atty. for Plaintiff.

[fol. 407] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 408] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 19, 1945

No. 11313

GENERAL MILLS, INC.,

versus

LEO H. STEELE

On this day this cause was called, and, after argument by Alfred McKnight, Esq., for appellant, and Cecil A. Morgan, Esq., for appellee, was submitted to the Court.

OPINION OF THE COURT AND DISSENTING OPINION OF HUTCHESON, CIRCUIT JUDGE—Filed January 8, 1946

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11313

GENERAL MILLS, INC., Appellant,

versus

LEO H. STEELE, Appellee

Appeal from the District Court of the United States for the Northern District of Texas

(January 8, 1946)

Before Hutcheson, Waller, and Lee, Circuit Judges.

WALLER, Circuit Judge:

Appellee agreed to transport, as a contract motor carrier, the merchandise of Appellant for a period of three years, in an area having a radius of 150 miles, for the com- [fol. 409] pensation of his actual expenses plus ten per cent. He performed his agreement until it was lawfully terminated three years later. There was in effect at the time of the making of this agreement, and during the entire three years, a statute, and an order of the Railroad Commission, of Texas, providing that the rates which a contract motor carrier, in competition with a common carrier, could charge should not be less than the minimum rates that a common carrier, performing substantially similar services, could charge.

Before Plaintiff could engage in the business as a contract motor carrier it was necessary for him to make application to, and secure a permit from, the Railroad Commission. In the application for such permit it was at least appropriate, and perhaps requisite, that the applicant should exhibit the contract under which he proposed to engage in such carriage. In conformity with the understanding between the parties, a proposed contract was prepared by Appellant, in which Sec. 13 provided that for such transportation of the Defendant's merchandise the

Plaintiff would receive his actual expenses, plus ten per cent. But when this contract was submitted by Mr. Steele to Mr. Morgan, one of his attorneys, the latter, on February 28, 1941, wrote Mr. Steele as follows:

"Dear Mr. Steele:

"Since you left this morning, I have again carefully considered the proposed contract to be entered into between you and General Mills.

"Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

"'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided [illegible] shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

[fol. 410] "Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

"Very truly yours, (Sgd.) Cecil A. Morgan.

"Mr. Steele:

"P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

"Very truly yours, (Sgd.) Cecil A. Morgan.

"Special delivery."

On March 27, 1941, Mr. Colfix, the Division Comptroller of General Mills, Inc., after Mr. Steele had shown him Mr. Morgan's letter of February 28, wrote an interoffice com-

munication[1] to Mr. Steele, who was then an employee of [fol.411] the Defendant, in which he stated, among other things, that if the substitution of the paragraph as suggested by Mr. Morgan were made:

> "It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the rate specified by the Railroad Commission. McCraney had the idea that the Railroad

[1] "March 27, 1941.

"Mr. L. H. Steele, Wichita Falls.

"Mr. L. B. Colfix, Oklahoma City.

"You received a letter from your attorney, Mr. Morgan, in which he recommended certain changes in the contemplated contract to be entered into between you and General Mills. The principal change has to do with the method of compensation for trucking services, and it is recommended by Mr. Morgan that the compensation be specified in the contract as follows:

"'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the rate specified by the Railroad Commission. McCraney had the idea that the Railroad Commission might not promulgate any rates. In that case we would have to have a charge not in conformity with the contract, which might cause difficulty.

"I think before we can give further consideration to this form of contract we should know definitely what kind of rates, if any, have been established by the Railroad Commission. Is there any way you can find out what factors they use in determining their rates and to what extent they may be expected to assign rates and when and if your permit is approved?"

"LBC/FH."

> Commission might not promulgate any rates. In that case we would have to have a charge not in conformity with the contract, which might cause difficulty."

On April 3, 1941, Mr. Christopher, a law partner of Mr. Morgan, and one of counsel for the Plaintiff, wrote Mr. Colfix, Division Comptroller for Defendant, stating among other things:

> "For your information and the basis upon which Mr. Morgan's recommendation was made with reference to the paragraph pertaining to rates, the Texas law (Article 911b Vernon's Annotated Civil Statutes 1925) provides as follows:
>
> "'The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.'
>
> [fol 412] "From the foregoing, you will see that the Statute itself fixes the rate to be charged by contract carriers as 'not less than the rate prescribed for common carriers for substantially the same service.'"

Mr. Christopher then concludes this letter as follows:

> "I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or to yourself with reference to this matter the next time Mr. Steele is in the office."

On April 5 Mr. Colfix wrote another interoffice communication to Mr. Steele, suggesting that the latter make arrangements for them to meet with Mr. Christopher at Fort Worth at an early date. This conference was held and concerning what occurred the testimony of Mr. Colfix is undisputed. He testified that:

> "I indicated to these gentlemen that the form of contract that they proposed to us was entirely different than the understanding that Mr. Steele and our com-

pany had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally execute a supplemental contract for the type of service that would be rendered by Steele for us."

On April 11, 1941, a letter from Mr. Christopher to Mr. Colfix stated:

"It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges [fol. 413] as have been prescribed by the Railroad Commission of Texas, * * *."

Mr. Christopher further stated in this letter:

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supplemental contract be entered into based upon the service rendered."

Mr. Christopher further stated:

"Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and the service actually rendered in comparison to service of common carriers. To me, how-

ever, it is simply a reasonable business risk, if it is a risk, which you can afford to take."

On April 17, 1941, the Defendant, by Mr. Colfix, wrote Mr. Christopher, stating, among other things, that:

> "After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills."

The real intention of the parties for compensation to Mr. Steele by the payment of expenses, plus ten per cent, was, upon the suggestion, advice, and assurance of the attorneys for Mr. Steele, withdrawn and paragraph 13, as drafted and suggested by Mr. Morgan, was inserted in the writing to be submitted to the Railroad Commission. The inserted paragraph is as follows:

> "13. It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, [fol. 414] charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

The permit was granted to Mr. Steele on July 9, 1941, and on July 31, 1941, the amendatory contract, as contemplated and agreed upon, was executed between Appellant and Appellee, in which paragraph 13 of the prior instrument was amended so as to put into effect that which had been the real agreement all along, namely, to pay the Plaintiff his expenses, plus ten per cent for the services to be rendered.

The testimony of Mr. Colfix, the letters aforementioned, the fact that the original contract of August 26, 1940, was promptly amended after the permit was granted, and the fact that Mr. Steele was compensated on the basis of the original agreement for the entire three years, during which there was never any protest from him that it was not in accord with the understanding and agreement of the parties,

all show beyond doubt that paragraph 13, as suggested and drafted by Mr. Morgan and inserted in the contract submitted to the Railroad Commission, was never intended to and did not then, theretofore, or thereafter, express the true agreement of the parties. However, Mr. Steele knew and carried out the actual understanding and performed the services during the entire period under the re-amended contract, and accepted without protest the agreed compensation of expenses, plus ten per cent. The conclusion is inescapable that the intent and purpose of substituting paragraph 13, as drafted by Mr. Morgan, in lieu of the real agreement, was not to express the intent and agreement of the parties but to serve as an aid in procuring a permit for the Plaintiff from the Railroad Commission. This substitution of paragraph 13 was nothing more nor less than a subterfuge.

It cannot be effectively contended that the contract sued on by the Plaintiff, to wit, the so-called contract of August 26, 1940, was, in fact, the contract or agreement of the parties, for it appears beyond doubt that the real contract between the parties was the contract of August 26, 1940, [fol. 415] as amended by striking out Mr. Morgan's paragraph 13 and reinstating the paragraph that truthfully set out the compensation that the parties had agreed would be paid Steele. This occurred on July 31, 1941. Nevertheless, upon the termination of the contract Mr. Steele, represented by the same attorneys who had advised the entering into of the contract, brought suit against General Mills, Inc., asserting that the agreement for Steele to charge, and for General Mills to pay less than the minimum rates payable under the Texas statute[2] and the orders of the Railroad

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[2] Sec. 6-aa, Article 911b, Texas Revised Civil Statutes, is as follows:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

Commission[3] to a common carrier performing similar services was illegal and void.

Although Mr. Christopher advised General Mills on April 11, 1941, that he did not believe there would be any element of violation of law involved if subsequently some additional contract was entered into in adjusting the rates, based on experience and service rendered, and added, "it is simply a reasonable business risk, if it is a risk, which you can afford to take," there is no intimation or suggestion in the record of any purpose at that time to entrap the Defendant into the situation into which Plaintiff now seeks to cast it.

The Defendant contended, in defense, that under Section 6-aa of Article 911b, of the Texas Revised Civil Statutes the Railroad Commission had the right only to fix the [fol. 416] minimum rates for contract carriers which were in competition with common carriers and which were performing substantially the same service, and that it was not performing such service, nor in such competition; that although the Railroad Commission had provided by general order that the rates charged by contract carriers should not be less than the minimum rates charged by common carriers, nevertheless, such rate could be made applicable only upon a specific finding by the Railroad Commission that the particular contract carrier was in competition with, and performing substantially the same service as, a common carrier; that under Section 6-aa of Article 911b, *supra*, the Railroad Commission was not authorized by the statutes of Texas to prescribe minimum rates for contract carriers who were not performing substantially similar services to, and who were not in competition with, common carriers; that if Section 6-aa of Article 911b, *supra*, undertakes to delegate such authority to prescribe the minimum rate for all contract carriers whether engaged in competition with common carriers or not, it would be unconstitutional; that the Railroad Commission is a body having a limited juris-

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[3] General Order No. 5, Texas Railroad Commission, provides that:

> "That rates, rules, and regulations in this tariff, or as may be amended, shall be observed * * * (B) by contract motor carriers as a minimum, on Texas intrastate traffic, unless permits issued by the Commission provide to the contrary."

diction under the statute and that any order made within the scope of such statute must affirmatively show that the jurisdictional requisites were present, and in the absence thereof, if the order of the Railroad Commission was intended to apply to the contract operations of the Appellee, then it is void on its face; that the special findings of the jury in the present case that the Appellee was not engaged in rendering substantially similar services to those of a common carrier, and its finding that the Appellee was not engaged in competition with any common carrier, which special verdicts were never set aside, rendered it necessary for the Court to have entered judgment in favor of the Appellant in the light of the asserted insufficiency of Section 6-aa of Article 911b, *supra*, to confer power upon the Railroad Commission to fix rates for a contract carrier not in such competition nor in the rendition of substantially similar services; that as a matter of fact the operations of Appellee were not similar to, nor in competition with, any common carrier; that the Railroad Commission made findings of fact which expressly and impliedly negatived the existence of competition between Plaintiff and common carriers in the services authorized to be performed by the permit; that if the contract between Appellant and Appellee was in vio-
[fol. 417] lation of the Texas Statute as contended, then the parties are in *pari delicto* and the Court should leave them where it found them; that there has been a full settlement and an account stated between the parties; that the Appellee is estopped from maintaining this suit; that the statute of limitations has run against any part of the claim accruing more than two years prior to the institution of the suit.

The jury made negative answers to both of the following special issues submitted to it:

> "First: Do you find from a preponderance of the evidence in this case that the operations of plaintiff Steele under his contract with defendant, were in competition with common carriers over the highways of Texas?
>
> "Second: Do you find from the evidence in this case that plaintiff Steele rendered substantially the same service as that rendered by common carriers, during the time and in the area of transportation herein involved?"

Nevertheless, the Court thereafter peremptorily instructed the jury to find for the Plaintiff, and a judgment for Plaintiff in the sum of $37,884.82 was entered against Defendant.

We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him.

Appellee sued on the statute and the writing that was prepared for presentation to the Railroad Commission, with Mr. Morgan's paragraph 13 therein, which provided for payment to Appellee according to rates and rules of the Railroad Commission, but the evidence is without dispute that paragraph 13 of this alleged contract was never intended by the parties to be a part of the real contract, and [fol. 418] was never the basis of payment during the three years of the service. It also is without serious doubt that the substituted paragraph 13, suggested and drawn by Plaintiff's counsel, and setting forth the provision that the applicant would charge the rates fixed by the Commission, was clearly a subterfuge, adopted in order to get by the Railroad Commission, for it was definitely understood that after the permit was obtained this provision would be eliminated and the provision which the Appellee now says was illegal, to wit, the provision to pay his expenses, plus ten per cent, would be put back into the contract.

Nevertheless, the writing of August 26, 1940, is sued on here without mention of the amendment of July 31, 1941, reinstating the original and real agreement of the parties as to the compensation to Steele. There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.

Appellee says that this provision in the supplemental contract for the payment of Steele is void, and he ignores the fact that it is a part and parcel of the only contract on which he can declare. A contract modified before there was any performance takes the place of the original one,

and consists of the new terms and any provisions of the original contract which the parties agree shall remain unchanged. Steele performed and was paid under the modified contract and a party cannot take the benefits of the modifying stipulations and at the same time repudiate their burdens. See 10 Tex. Jur., § 207, page 365.

We think with Appellee that the so-called supplemental contract was void, but we also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties; but that even if it had been *bona fide* and genuine when the instrument was amended prior to any performance, such amendment eliminated the spurious paragraph 13 and became as much a part of the contract as did any other paragraph thereof, and whatever there is of illegality in the method of payment is a part and parcel of the only contract between the parties. The provision for payment under rates and rules of the Railroad Commission so taken out and discarded never was intended to be, and, therefore, never was, in fact or in law, the agreement of the parties.

[fol. 419] Moreover, when General Mills and Steele agreed to the insertion of paragraph 13, as suggested and drawn by Mr. Morgan, for the sole purpose of getting by the Railroad Commission, well knowing that such a provision was not to be a permanent part of the contract and that it was not expected to be retained or complied with, they committed a fraud upon the lawfully constituted officials of the State of Texas, viz., the Railroad Commission. The conclusion seems inescapable that both parties knew full well that this was a subterfuge, and that neither had any idea of paying the rates provided for in that instrument, and that their participation in the execution thereof with the intent to use it only as a "front" for getting a permit for Steele was an act contrary to good morals and that tended to injustice and to interfere with the purity of the administration of the law such as puts both parties in *pari delicto* with no right to seek advantage or recovery out of paragraph 13, the spurious portion of the instrument.

These views are in no wise in conflict with the holdings of this Court in the case of *Bowen Motor Coaches vs. New York Casualty Company*, 139 F. 2d 332, but in conformity therewith, for in that case we held that under the facts "there was no corrupt agreement to violate the law, no

crime was to be committed. The parties were trying to act in accordance with the statute." The inference is that if there had been a corrupt agreement to violate the law, or if the parties had been trying to violate the statute instead of acting in accordance with it, the doctrine of *pari delicto* would have been applied.

In *Battles vs. Braniff Airways*, 146 F. 2d 336, we did not expressly say so, but impliedly we agreed with the Appellant's contention that since he was a receiver representing not merely the company but its creditors, he would not be adjudged in *pari delicto*.

There should be a distinction between a receiver suing in behalf of creditors and a plaintiff who is *particeps criminis* suing under the very statute that he so glibly violated.

Plaintiff, however, was not content to stand solely upon his alleged contract. He also claims a right of recovery because of the statutes of the State of Texas and the regulations and orders of its Railroad Commission. In other words, he asserts that he is entitled to recover under the contract sued on, and that he is also entitled to recover [fol. 420] under the statute of Texas which provides that a contract carrier shall charge, and the shipper shall pay, the rates prescribed by the Commission, which cannot be less than the minimum rates charged by a common carrier performing similar services. Having definitely concluded that he has no right of recovery under paragraph 13 of the contract sued on, we next inquire whether or not the Plaintiff can sustain his claimed right to recover under the statute.[4] The pertinent statutes of Texas make it illegal for a contract carrier to charge other than the rates prescribed and fixed by the Commission, and the failure to comply with the law, or with the lawful regulations and orders of the Commission, is a misdemeanor punishable by fine. The violator is also subject to a penalty recoverable by the State at the suit of its Attorney General or the District, or County, Attorney. No Texas statute expressly declares that a contract contrary to the statutes or regulations shall be void, nor do any of them contain an express provision authorizing a suit by anyone—other than the Attorney General, the District, or County, Attorney, in a suit on behalf of the State of Texas to recover the penalty of $100.00 per day for each

[4] Art. 1690b, Texas Penal Code, Pars. (b), (c), (g), (h), and (i).

day's violation—such as is found in the Fair Labor Standards Act, the Anti Trust Act, or the Price Control Act. There is no ruling here of the Interstate Commerce Commission or other governmental agency that requires the carrier to sue to recover under-charges such as Interstate Commerce Commission Conf. Ruling # 314, Bulletin 7, saying in part:

> "It follows that it is the duty of carriers to exhaust their legal remedies in order to collect under-charges from the party or parties legally responsible therefor."

It will be assumed, however, that any contract, the execution of which is a criminal offense, is illegal and unenforceable. It may also be true that even though there is no provision in the statute authorizing a person to bring suit under it, nevertheless, he may do so if he has been specially injured and if it clearly appears that the statute was enacted for his protection or benefit,[5] and if he by [fol. 421]

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[5] "An action for the violation of a statutory duty is generally maintainable by any person injured thereby, who suffers a special damage therefrom, and who is of a class entitled to take advantage of the law. Within the meaning of this rule, persons entitled to take advantage of the law are members of the class intended to be protected by the statute, or for the benefit of whom the statute was enacted. Indeed, even though the violation of a statute is regarded as actionable, it is generally required that the injury be done to one of the class designed to be protected by the statute, or for whose benefit the statute was enacted, and to whom a duty of compliance with the statute is owed. It has also been stated as general rules that a statutory right of action may be maintained only for the benefit of the persons specified in the statute, and that where a right is given by statute, only those to whom the right is in terms given may avail themselves of its benefits." 50 Am. Jur., § 587, page 582.

In *Northwood vs. Galveston H. & S. A. Ry. Co.*, 34 S. W. 780, the Texas Court of Civil Appeals, citing and quoting Blackstone, said:

"The law gives no private remedy for anything but a private wrong."

"Where a statute prohibits the doing of a particular action affecting the public no person has a right of action

his own participation in some illegal arrangement has not barred his right to relief through the processes of the Court.

The statute here does not expressly authorize a suit for the recovery of the prescribed rates by anyone and we should not hold it to be the law that one has a statutory cause of action under a statute which he has intentionally violated and disregarded unless there is express language, or a clear intent on the part of the Legislature, that the par-
[fol. 422] ticular statute was enacted for his benefit and protection.

In the instant case the statute was not for the benefit of contract carriers but for the benefit of common carriers.

The Plaintiff here can show no special damage. He received a clear profit of ten per cent out of every truck-load that he hauled. Moreover, he cannot claim special
[fol. 423] damages to himself which he himself caused by his own conduct and contract.

In 1 Tex. Jur. § 18, page 625, appears this statement:

> "In general the law affords to private persons a remedy for private wrongs only. So where a statute

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against another merely because he has done the prohibited act. It is incumbent on the part of the complainant to allege and prove that the doing of the act prohibited has caused him some special damage, some particular injury, beyond that which he may be supposed to have sustained in common with the rest of the queen's subjects by an infringement of the law."

In *Texas & N. O. R. Co. vs. Brotherhood of Ry. Steamship Clerks*, 33 F. 2d 13, we said:

"The violation of a duty created by statute, resulting in damage to one of a class for whose benefit the duty was imposed, confers a right of action upon the injured person, though the statute makes no provision as to a remedy for such wrong. Marbury vs. Madison, 1 Cranch. 137, 163, 2 L. Ed. 60; DeLima vs. Bidwell, 182 U. S. 1, 176, 21 S. Ct. 743, 45 L. Ed. 1041; 1 Corpus Juris 951."

* * * * * * *

"A statutory right of action exists only in favor of those for whose benefit the duty is imposed, and Plaintiff must

prohibits the doing of a particular act affecting the public, the mere commission of the prohibited act confers no personal or private right of action."

A statute that is passed for the protection of the general public against negligence can be the basis of a suit for a recovery by anyone specially injured as a result of failure to observe such statute, similarly as one may recover under a contract entered into by third parties for his benefit; such as a contract between the City and a water company to supply water with which to fight fire,[6] but the provision in the statute here to require a contract carrier who is in competition with common carriers rendering substantially similar service to charge not less than such common carrier was to protect the common carrier from indiscriminate and disastrous competition. It will be noted here that the statutory requirement was not that the contract carrier should not charge *more* than a common carrier, but that it should not charge *less* than such common carrier. It was not a regulation for the benefit of the citizen generally in an endeavor to secure cheaper transportation, nor was it

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show not only a violation of the statute bu- that the *inquiry* complained of was occasioned thereby" 1 C. J. 952, § 47.

* * * * * * *

* * * The true rule is that the question depends upon the intention of the legislature as construed from the provisions of the particular statute; and if it appears that the duty imposed is merely for the benefit of the public, and the fine or penalty a means of enforcing the duty and punishing a breach thereof, the fine or penalty is exclusive, and a private action cannot be maintained for injury sustained by reason of the breach. If, on the other hand, it appears that the duty imposed is also for the benefit of particular individuals or classes of individuals, a private right of action arises for injury sustained by reason of the breach, by any person the statute was designed to protect, provided the injury sustained by him is a special injury different from that inflicted on the general public, and has resulted proximately from and because of the violation; * * *" 1 C. J. S. § 12, page 996.

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[6] *Mugge vs. Tampa Water Works Company*, 53 Fla. 371, 42 So. 81.

for the purpose of benefiting one who purposely violated it.[7] Moreover, a contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He has no other customer in whose favor he could [fol. 424] discriminate. The statutes against discrimination by a contract carrier having only one customer were never intended for the benefit or protection of either the contract carrier or his customer, but were intended only to prevent a contract carrier who is in competition with a common carrier in the performance of similar services from underselling the common carrier. The present suit is not a suit by a common carrier; it is not a suit for penalties by the Attorney General; but it is a suit by one who violated the statute for three years, and until the end of his contract, meanwhile being protected from any hazard of financial loss by receiving all expenses back, plus a profit of ten per cent, and who, when such profit ceased to flow, then decided that the statute ought to be enforced—but only as against his contractee.

Surely a Daniel has come to judgment and from what a remarkable source!

The statute was not enacted for his protection, and we are of the opinion that the Plaintiff has no right of action either under the contract or under the statute.

The judgment should have been for the Defendant and the cause is reversed with directions to enter such judgment.

Reversed.

DISSENTING OPINION

HUTCHESON, Circuit Judge, Dissenting:

I deprecate as much as my associates do the fact that appellant, a trusted employee of appellee and well rep-

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[7] "Appellant presents several propositions, but we deem it unnecessary to discuss them, because the law is well settled that no legal right arises out of an unlawful act; and no action can be maintained upon a claim arising out of or based upon an illegal act, if plaintiff must rely in any way upon the illegal transaction to make out or establish his case. Dufek v. Harrison County (Tex. Civ. App.) 289 S. W. 741; 1 Tex. Jurisprudence, 621; 1 C. J. 957; 1 R. C. L. 317; and numerous cases there cited and discussed." *Heard vs. Denman*, 29 S. W. 2d 824.

resented by counsel, has welshed on his agreement, deliberately and thoughtfully entered into on advice of counsel, and in the name of the law is profiting thereby. But I cannot agree that appellee may in law be allowed to have the service performed without paying the statutory rate it agreed, and the law compelled it to pay. I think it clear that the district judge was right in the view he took, that the authorities in Texas leave in no doubt that rates prescribed by the Texas Railroad Commission are the only proper rates which may be charged and that a cause of action arises out of the statute in favor of any person who performs the services for which the rates are prescribed. The Railroad Commission's general order of 1931, therefore, prescribing common carrier rates as mini-
[fol. 425] mum rates was applicable to Steele's permit and was valid and enforceable. The supplemental contract for a less rate which was never approved by the Commission was not a valid contract of carriage, and though the parties acted, and payments were made, under it, this constitutes no defense to an action for the statutory rate. *Herrin v. Marmion*, 113SW (2) 291; *Pittsburgh v. Fink*, 250 U. S. 577. On the authority of Texas cases which apply the same doctrine to insurance rates that they do to carrier rates, we held in *Bowen Motor Coaches v. N. Y. Casualty Co.*, 139 F. (2) 332, that no contract could change the statutory rates and that they must be collected. To the suggestion made there that because the parties were in *pari delicto* in making an unlawful contract, plaintiff could not recover, we said, 'There was here no corrupt agreement to violate the law. No crime was to be committed.'' In *Battles v. Braniff*, 146 F. (2) 338, we held that no matter how illegal an agreement, to pay a less premium than the statute, was, or how illegally it was entered into, it would be ineffective to prevent recovery in a suit on the policy for the premiums the law fixed as due.

I cannot, therefore, agree with the view of my associates, that the appellee should be permitted to have its freight hauled for less charge than others were under the law compelled to pay, and appellant, because in *pari delicto* with appellee, may not recover. In the first place, I do not agree that the evidence supports the view the majority opinion expresses that the parties entered into their arrangements with the deliberate purposes of defeating the law. Their letters and their conduct, I think, show

beyond question that they thought they were not evading but complying with the law. From the letters of Christopher and the attorneys for General Mills no other view may be gathered than that they thought that the services to be performed by Steele would not be similar services to those performed by common carriers, and the Commission's 1931 general order, making common carrier rates minimum for contract carriers performing similar services did not therefore apply. I am of the opinion, therefore, that when the agreement was made, they did not intend to commit a crime, that is, to violate the law and subject themselves to a penalty of $200.00 a day each. If this is the correct view of the facts, and I think it is, then clearly the *pari delicto* [fol. 426] doctrine does not apply. *Bowen v. N. Y. Casualty Co., supra.*

But if I could agree that there was a deliberate intent to defraud the statute, I still could not agree with the majority, whether plaintiff's suit is to be regarded as on the written contract which was exhibited to and filed with the Commission, or on the right arising out of the statute to recover the legal charges for the services rendered, for the right to recover the legal charges and no other rests on an overriding public policy. This policy is so imperative that it may not be defeated by the conduct of the parties in entering into legal and evasive arrangements which it is the very purpose of the policy to strike down. It remains to consider only whether the suit was on the contract signed by the parties and exhibited to the Commission as a basis for the permit, and therefore, the defense of limitation is unavailable, or was on the statutory obligation arising from the performance of the service, and, therefore, limitation has barred a part of the recovery. It seems clear to me that plaintiff's suit is on the contract, which the parties made and exhibited to the Commission, and in which they agreed to pay the legal rates, and that the case is ruled by *Central Freight v. C & S Motor Freight Lines*, 125 SW 615. There the court held ineffective a private agreement which, as here, was not submitted to the Commission. I think the judgment should be affirmed, and I respectfully dissent from its reversal.

JUDGMENT

Extract from the Minutes of January 8th, 1946.

No. 11313

GENERAL MILLS, INC.,

versus

LEO H. STEELE

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel; [fol. 427] On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendant;

It is further ordered and adjudged that the appellee, Leo H. Steele, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, dissents."

[fol. 428] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed January 28, 1946

To Said Honorable Court:

Your petitioner, Leo H. Steele, files this Petition for Rehearing in the above case based upon the following grounds and says:

Assignment of Error

The court erred in holding that plaintiff cannot collect the freight rates fixed by the Railroad Commission of

Texas, and as provided for in his contract filed with the Commission, on the proposition that he was in pari delicto and was engaged in a corrupt and criminal scheme, for all and singular the following reasons:

1

It is contrary to and violates and conflicts with the laws and the public policy of the State of Texas, as declared [fol. 429] by the Legislature and the decisions of the courts of Texas, as well as the decisions of the Federal Courts.

2

It is in direct conflict with the decisions of this court in *Battles v. Braniff Airways*, 146 F. 2d 336; *Bowen Motor Coaches v. New York Casualty Company*, 139 F. 2d 232, and with the decision in the case of *Herbert Simmons v. Irene Simmons*, 19 F. 2d 690, 54 A. L. R. 75.

3

There was no pleading and no evidence that the parties were engaged in a corrupt and criminal scheme, and no finding of fact by the trial court to that effect, and it cannot be said that the undisputed evidence shows the same to be true. The presumption of law in Texas is that the parties were attempting to proceed in a legal manner, and such presumption cannot be overcome except by evidence. Criminal and corrupt acts are determined by intentions and purposes of the parties, which is always a fact question, and this court is, therefore, without jurisdiction to find facts from conflicting evidence and render judgment based upon such findings of fact contrary to the findings of fact and decision of the trial court.

4

The effect of this decision is to substitute freight rates for those fixed by the Railroad Commission of Texas by the simple expedient of refusing to enforce those rates because the parties were guilty of a misdemeanor and thus [fol. 430] to allow the parties, because of such misdemeanor, to substitute their own rates for those fixed by the Railroad Commission.

Discussion

The Legislature has declared the Public Policy of Texas in Section 22b of Article 911b, Vernon's Annotated Statutes of 1925, as follows:

> "Sec. 22b. Declaration of Policy. The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that dicrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 21."

[fol. 431] It was held by the Supreme Court of Texas in *West Texas Compress & Warehouse Co. v. Ry. Co.*, 15 SWR (2nd) 558 (560), that:

> "The rates promulgated by the Commission have the same force as a like enactment of the Legislature itself."

It was held in *Railroad Commission of Texas v. Uvalde Construction Co.*, 49 SWR (2nd) 1113, that such rate making power was vested exclusively in the Railroad Commission and cannot be exercised by the court and that the courts have no power to usurp the function of the Commission, as to permit it to do so would be to invade the legislative field.

To the same effect is *Central Freight Lines, Inc. v. C. & S. Frt. Lines Inc.*, 125 SWR (2nd) 615.

It was held in *Texas C. Ry. Co. v. Kerns*, 108 SWR 187, that:

> "In every contract of shipment in this state the law writes the particular rate fixed and authorized by the Railroad Commission of Texas; and neither the initial carrier in this state nor its connecting carrier in this state can lawfully depart therefrom."

These decisions demonstrate that the rate fixed in this case was a legislative act the same as if the Legislature had passed it, and the effect of the judgment of this court is to refuse to enforce a legislative act of the State of Texas simply because the parties, as found by it, were guilty of a misdemeanor. If this rule is sustained it will provide a [fol. 432] very convenient method for a shipper and a carrier to circumvent the rates fixed by the Railroad Commission of Texas. We understand this court to hold that an exception to the pari delicto rule would be granted in this case, except for the fact that the parties were engaged in a corrupt and criminal scheme to defraud the Railroad Commission of Texas. Therefore, the only thing that would be required of a shipper and a carrier would be to make their agreement as corrupt and criminal as possible, but keeping the penalties within the range of a misdemeanor. it offers a premium for corrupt and criminal acts. The very statement of the rule ought to condemn it.

Such is not the correct rule in Texas or elsewhere. 10 Tex. Jur., page 238, Sec. 137, says that:

> "Relief will be granted to parties to illegal contracts who are not in pari delicto, and even as between parties in pari delicto if public policy demands it. As between parties in pari delicto relief is granted to discourage such transactions by others. The guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom relief is granted being only the instrument by which the public is served."

While the case of *Prudential Life Ins. Co. v. Pearson*, 188 SWR 513, was reversed on other grounds, it adopted the rule from Pomeroy, Equity Jurisprudence, Vol. 2, para. 941, as follows:

> "Even where the contracting parties are in pari delicto, the courts may interfere from motives of pub-

lic policy. Whenever public policy is considered as advanced by allowing either party to sue for relief [fol. 433] against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a higher public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering a surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement."

That is the general rule as stated in 12 American Jurisprudence 729, Sec. 214, as follows:

"Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal agreements, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under agreements of this character in which the public interests will be better promoted by granting than by denying relief, and in such cases the general rule must yield to this policy. Hence, even between parties in pari delicto, relief will sometimes be granted if public policy demands it. The general rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction and takes away the temptation to engage in agreements contra bonos mores or in violation of the policy of the law. If it is necessary, in order to discountenance such transactions, to enforce such an agreement at law or to relieve against it in equity, it will be done, though both the parties are in pari delicto. The party is not allowed to allege his own turpitude, in such cases, when he is the defendant at law; nor is he prevented from alleging it when he is the plaintiff [fol. 434] in equity, if the refusal to execute the agreement at law or the refusal to relieve against it in equity would give effect to the original purpose and encourage the parties engaging in such transactions. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom relief is granted being only the instrument by which the public is served."

Cases supporting this rule were there cited under note eleven.

The reason for this rule is that in all suits of this character the State is an interested party. It makes no difference that the State is not actually a party litigant. It is necessarily an interested party and the public welfare will be affected by the decision. Such was the holding of the District of Columbia Court of Appeals in *Herbert Simmons v. Irene Simmons*, 19 Fed. (2nd) 609, 54 A.L.R. 75. That was a suit for divorce with a cross-action for annulment on the ground that when the marriage took place the plaintiff had a husband living from whom she had not been legally divorced, and it appeared that the parties deliberately entered into the marriage relationship with full knowledge of the facts. The Federal District Court refused judgment on the ground that the parties were in pari delicto. The court said:

> "In proceedings to annul a void marriage, especially where it is so declared by statute, the rule of pari delicto and the equitable principle of 'clean hands' are inapplicable, since in such cases the state becomes a third party. While it is a settled principle [fol. 435] of law that, where parties are in pari delicto, the court will refuse to extend them aid, and will leave them without remedy against each other, it is equally true that, where the state is an interested party, the contributing guilt of the parties to the suit will not operate as a bar to the granting of relief."

The court further said:

> "The interests of the state extends beyond the private grievances of the parties directly involved. It sponsors the welfare of society and the sanctity of the marriage relation."

And further:

> "The equitable rule, that 'he who comes into equity must come with clean hands,' has no application, where its enforcement would result in sustaining an act declared by statute to be void, or against public policy. In such cases, the interest of society intervenes, and the state is regarded as a third party."

The United States Supreme Court has repeatedly applied this rule as shown by the cases cited in *Louisville & N. R. Co. v. Central Iron & C. Co.*, 265 U. S. 59, 68 L. Ed. 900. It is true these cases involved rates fixed by the Interstate Commerce Commission, but the rule is the same as to intrastate shipments as we will show later. The court in the last cited case said:

> "No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges."

[fol. 436] In *P. C. C. & St. L. R. Co. v. Fink*, 63 L. Ed. 1151, 250 U. S. 577, it was held that it made no difference whether the contract for a different rate was made in good faith or bad faith, the result was the same.

In notes to 49 L. R. A. (NS) page 93, is found the following:

> "The same rule has been applied to intrastate shipments under state statutes regulating rates and prohibiting discrimination, it being held that the carrier can recover the difference between the legal rate and a lower rate charged the shipper. Central of Georgia R. Co. v. Willingham, 8 Ga. App. 817, 70 S. E. 199; New Yo[illegible] & H. R. R. Co. v. Smoth, 62 Misc. 526, 115 N. [illegible]p. 838. In the former case, the court expressly held that there should be no difference in the carrier's right to recover the difference between the rate charged and the legal rate, whether the latter was the rate prescribed by the Interstate Commerce Commission or by the railroad commission of the state. In the latter case, the state statute somewhat resembled the interstate commerce act, requiring the rates to be filed with the public service commission and schedules to be posted in each depot."

We now refer to the conflict between the decision of this court and the decisions in *Battles v. Braniff Airways*, 146 F. 2d 336; *Bowen Motor Coaches v. New York Casualty Company*, 139 F. 2d 232, and *Herbert Simmons v. Irene Simmons*, 19 F. 2d 690, 54 A L. R. 75. We can see no valid distinction between this case and the two decisions of this court from Texas on the insurance law. The two Texas cases decided by this court were cases where contracts [fol. 437] were made for the purpose of obtaining a lower

rate than that fixed by the Insurance Commissioner of the State of Texas. We understand the decision in this case to distinguish it from those two cases on the ground that here there is a corrupt and criminal scheme and the parties were in pari delicto and therefore the public policy which ordinarily prevents either party from recovering under the contract supersedes and is of greater importance than the public policy which will permit parties in pari delicto to sue on the contract where the public welfare would best be served by permitting such suit to be maintained.

Section 571 of the Texas Penal Code provides that:

> "Whoever violates any provision of the laws of this State regulating the business of life, fire, or marine insurance, shall, where the punishment is not otherwise provided for, be fined not less than five hundred nor more than one thousand dollars."

Article 4894, Revised Civil Statutes, is an insurance statute on rebating and discrimination and makes such an offense under the insurance law. Therefore, the insurance cases were clear violations of the Penal Code of Texas.

In *Federal Life Insurance Company v. Hoskins*, 185 SWR 607, a contract was made in direct violation of these statutes and suit was defended on the ground of such violation and allegation of pari delicto. The court allowed a recovery.

But we contend that this court had no jurisdiction to find facts not found by the trial court and not raised [fol. 438] by the pleadings nor the evidence and not found from the undisputed evidence in the case, to sustain its conclusion that there was a corrupt and criminal scheme. In the first place the parties are presumed to have proceeded in a legal manner. This requires no citation of authority. This presumption of the Texas law must be followed by the Federal Courts sitting in Texas: *Cities Service Oil Co. v. Dunlop*, 84 L. Ed. 196, 308 U. S. 208. We believe that this court is without authority to find any such facts as has been done in the instant case. *Union Bleachery v. U. S.*, 79 Fed. 2d 549; *North American Acc. Ins. Co. v. Anderson*, 100 Fed. 2d 452; *McGee v. Nee*, 113 Fed. 2d 543.

Whether or not a party is violating the criminal laws certainly involves the question of intent as does the ques-

tion as to whether he is engaging in a corrupt scheme. In any investigation of a criminal act it is a question of fact as to what the parties intended. It certainly cannot be said that the undisputed evidence shows beyond the point where reasonable minds could disagree that the parties were deliberately violating criminal statutes and engaging in a corrupt scheme. If such issue were in the case it should have been submitted to the trial court and either he or the jury should have been requested to find the facts with respect thereto.

This court found:

> "It also is without serious doubt that the substituted paragraph 13, suggested and drawn by Plaintiff's counsel, and setting forth the provision that the applicant would charge the rates fixed by the Commission, was clearly a subterfuge, adopted in order [fol. 439] to get by the Railroad Commission, for it was definitely understood that after the permit was obtained this provision would be eliminated and that provision which the Appellee now says was illegal, to wit, the provision to pay his expense, plus ten per cent, would be put back into the contract."

This question was not found by the trial court, was not at issue and no request was made to find on it, and this court is without jurisdiction so to find.

This court also found:

> "There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.
>
> "We also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties.
>
> "The provision for payment under rates and rules of the Railrad Commission so taken out and discarded never was intended to be, and, therefore, never was, in fact or in law, the agreement of the parties."

These facts were not put in issue, no findings of fact made, and none requested on these issues, and this court is without jurisdiction to find them as a basis for its judgment entirely different from that of the trial court.

Neither party requested any such issues to be submitted and none were submited and no such findings made.

[fol. 440] The very fact that one member of this court disagrees to the point of dissenting, clearly shows that reasonable minds can disagree as to whether these conclusions can be properly drawn from the evidence. The worst that can be said about all of these questions is that they might provoke fact issues if properly raised, and if they are material to a determination of this case, then such fact questions were for the trier of the facts to determine but this court has no jurisdiction to substitute its findings of fact for that of the trial court and to render its judgment based upon its own independent findings of fact. *Seely Oil & Gas Co. v. RRC*, 128 Fed. (2d) 334.

The point on which this court reversed and rendered judgment was not even raised in the trial court. See affidavit of L. B. Colfix in response to Motion for Summary Judgment (R. 44) and First Amended Answer of defendant (R. 54) wherein the only defense at issue was the lack of power of the Railroad Commission to issue the orders because there was not similarity of service and competition. The defendants requested only the special issues shown on pages 81 to 86 inclusive. None of them related to that question. The findings of fact begin on page 88 of the Record and do not include any such findings, but the trial court did expressly withdraw and eliminate from the record all of the letters and the supplemental contract identified as Exhibit 8 quoted by this court in the majority opinion as the basis of its decision, and they were therefore not in evidence in the trial court nor in evidence before this court. Finding 11 on page 94 reads in the last sentence:

> [fol. 441] "Exhibits 4, 5, 6, 7 and 8 related to inter-office correspondence between the defendant and the plaintiff and his attorneys, all of which letters were admitted by the Court through a misunderstanding as to their import and purpose and are withdrawn as evidence in this case." (R. 94).

No exception was taken to the action of the court in excluding those exhibits. Therefore, this court was not only without jurisdiction and authority to find facts, but it was clearly in error in going out of the record and quoting from documents which had been specifically excluded by

the trial court without objection as the basis for its judgment.

Exhibit 1 so excluded is on page 188 of the Record, Exhibit 2 on page 192, Exhibit 3 on page 194, Exhibit 4 on page 196, Exhibit 5 on page 200, Exhibit 6 on page 204, Exhibit 7 on page 206 and Exhibit 8 on page 208. In this connection it should be noticed that Exhibit 8 is the supplementary contract in question and it was excluded as repeatedly urged by the plaintiff because of its illegality and because relied upon by the defendant as a defense to the suit for the collection of the legal rates fixed by the Railroad Commission. Therefore, all of the said letters quoted by this court and the so-called supplemental agreement, which this court said was a part of the original agreement, have been by the trial court expressly excluded and withdrawn and are not before this court and it is without authority to rely upon such exhibits as the basis for its findings and conclusions and judgment contrary to that of the trial court.

[fol. 442] The question on which this court decided the case was not raised by the defendant in its Motion for Instructed Verdict. (R. 174.)

On page 357 of the record, and after the close of all the evidence, the defendant filed another motion for an instructed verdict which did not raise any of the questions upon which this court made findings of fact and rendered judgment contrary to the trial court. The only place the question of the correspondence was raised was in paragraphs 8 and 9 of the said motion (R. 360) where such correspondence and such acts were set out as the basis of an estoppel.

In his charge to the jury and without objection from the defendant the trial court said:

> "Now, in the progress of the trial, over the very strenuous objection of the plaintiff, I admitted, at the instance of the Defendant, in evidence, certain letters which had passed between lawyers and the Plaintiff took exceptions to my action in allowing those letters to go in before you as evidence.
>
> "In that connection, since the matter has been discussed pro and con here, I want to say to you that in admitting the letters written by lawyers giving their opinions as to what the character of Plaintiff's serv-

ices to defendant would be, were admitted only on the plea that they constituted a part of the contract referred to by them as a supplemental contract that was finally entered into between the parties." (R. 364.)

The only objections made to that limitation of the use of the letters were that they contained material facts [fol. 443] which were relevant to the issues of fact submitted to the jury. The defendant did not contend that they were being used or that they were being offered or should be considered for the purpose for which this court now considers them even if they had not subsequently been withdrawn from the record.

In a colloquy with the trial judge Mr. McKnight for the defendant said they were offered for the purpose of connecting the original and supplemental contracts to show that each was a part of the other and he said he offered them for some other reasons which he did not disclose but the succeeding pages of the Record clearly show that they were offered and at the time admitted for a very limited purpose and later withdrawn. In his instructed verdict to the jury (R. 390) the court said:

> "Frankly, I am afraid I confused you by permitting you to have before you such evidence as those letters passed between lawyers, in which legal opinions were expressed. I permitted them on one presented theory, and they were used on entirely a different theory." (R. 390.)

We respectfully urge the court to reconsider its finding and opinion in the light of the evidence as offered to and limited by the trial court, and in the light of the issues raised by the pleadings and motions for instructed verdict and the exceptions filed in the trial court, all of which clearly show that the parties proceeded upon a good faith erroneous conclusion as to what the law was. This was evidenced by the fact that Mr. Christopher of counsel later [fol. 444] tried a case in the State court in which he made the same contentions that he made in his letter to the defendant and which contention was not sustained but was overruled by the State court. (R. 150.)

We respectfully say that the effect of this court's decision is to permit the parties by decree to substitute freight rates for those fixed by the Railroad Commission

of Texas, in violation of the expressed public policy of this state and to give legal sanction to the second contract by permitting the defendant to rely upon it as a defense to a suit by the plaintiff to enforce rates fixed by the Railroad Commission of Texas wholly independent of any contract. In other words, the legal freight rate was necessarily written into each and every bill of lading as introduced in evidence, as well as any and all contracts between the parties. The plaintiff sued on two grounds (1) that he is entitled to recover under his contract by which the legal rate was to be charged, and (2) he was entitled to recover under the rate fixed by the Railroad Commission of Texas and the written statement filed with the Railroad Commission that the legal rate should be charged, as well as the bills of lading in evidence showing the shipments, all of which could be recovered upon without relying upon any illegal contract or transaction. This he could do under the authorities cited in our original brief. Cf. *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805. The defendant pleads the second contract and the illegal transactions and relies upon it to defend. The plaintiff does not have to rely upon it at all and did not rely upon it at the trial.

[fol. 445] Wherefore, premises considered, the appellant respectfully prays that this court grant a rehearing and that the judgment of the trial court be affirmed.

Respectfully submitted, Cecil A. Morgan, Post Office Address: 806 First National Bank Building, Fort Worth 2, Texas; T. S. Christopher, Post Office Address: 806 First National Bank Building, Fort Worth 2, Texas, Counsel for Appellee.

Culbertson, Morgan, Christopher & Bailey,
Post Office Address:
806 First National Bank Building,
Fort Worth 2, Texas.

Copies of this Petition for Rehearing have been furnished to appellant's attorneys, Charles E. France and the firm of Miley, Hoffman, France & Johnson, whose post office address is First National Bank Building, Oklahoma City, Oklahoma, and Alfred McKnight and the firm of Cantey, Hanger, McMahon, McKnight & Johnson, whose post office address is 1500 Sinclair Building, Fort Worth 2, Texas.

Cecil A. Morgan.

[fol. 446] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

APPELLANT'S REPLY TO APPELLEE'S PETITION FOR REHEARING—Filed February 2, 1946

May It Please the Court:

Appellant, General Mills, Inc., presents the following brief reply to appellee's petition for rehearing:

1. The contention is made that appellant did not plead as a defense the grounds upon which this Court decided the case. This position is untenable. The facts relied upon by this Court were specifically plead (Paragraphs 15 and 16, appellant's trial answer, pages 64 to 66, Record). Furthermore, the correspondence set forth in this Court's opinion was attached to and made a part of the answer as exhibits (See Record, page 81). The exhibits are not copied in the Record as part of the answer inasmuch as they appear as exhibits in the statement of the evidence and are there [fol. 447] copied. Appellant specially plead that the original contract was merged in the supplemental contract which constituted the true agreement between the parties and no cause of action existed thereunder and that no cause of action exists in appellee's favor to collect the rates and fares set forth in the tariff of the Railroad Commission even if applicable to the transportation and hauling involved (Record 64); the very legal contention sustained by this Court; and also that appellee by reason of his own conduct was estopped from recovering (Record 66).

2. It is also asserted that the grounds upon which this Court decided the case were not raised by appellant's motion for an instructed verdict. Counsel referred to the motion made by appellant at the conclusion of appellee's evidence (Record 174-177) before appellant's evidence, disclosing the undisputed facts relied upon by this Court, was introduced. In appellant's motion for an instructed verdict made at the conclusion of all the evidence, and when the facts were properly before the court, the very grounds sustained by this Court were urged by appellant in support of its motion for an instructed verdict (see Paragraphs 7 and 9, appellant's motion for instructed verdict at the con-

clusion of the evidence in the case, Record, pages 359 and 360).

3. The astounding contention is also made that this Court decided the case on evidence not in the Record. This contention is based upon a statement contained in the trial court's findings of fact, found at page 94 of the Record, wherein the trial court said:

> [fol. 448] "Exhibits 4, 5, 6, 7 and 8 related to inter-office correspondence between the defendant and the plaintiff and his attorneys, all of which letters were admitted by the Court through a misunderstanding as to their import and purpose and are withdrawn as evidence in this case."

The findings of fact and conclusions of law are dated December 26, 1944, but were not filed until March 5, 1945 (Record 88), long after the entry of final judgment on December 26, 1944 (Record 104-107), and, for that matter, after notice and perfection of appeal on January 8, 1945 (Record 107-109). The findings of fact and conclusions of law were duly excepted to by appellant (Record 99-104) and they have no legitimate place in this Record under the Rules of Civil Procedure. The action of the trial court in filing findings of fact and conclusions of law constituted the basis of appellant's Fifth Specification of Error in this Court (appellant's brief, page 17). The impropriety of filing findings of fact and conclusions of law is pointed out in appellant's brief at pages 79 and 80. The only provisions for filing findings of fact and conclusions of law are found under Rules 52 and 49 (Rules of Civil Procedure), wherein the court is *required* to file findings of fact and conclusions of law in cases tried without a jury and is *permitted* to file findings of fact and conclusions of law on omitted issues in instances where a special verdict is rendered and *judgment is rendered on the special verdict.* Neither is true here. The judgment here appealed from was based upon an instructed verdict of the jury.

Furthermore, the statement of the trial court that the [fol. 449] exhibits "are withdrawn as evidence" is not a finding of fact. We know of no rule whereby a court may withdraw evidence introduced during the trial of a case by findings of fact filed after the trial is concluded; the judg-

ment announced; the jury discharged; final judgment entered; and appeal perfected. As a matter of fact, the correspondence referred to was not withdrawn by the trial court as evidence in the case. It was introduced and offered in evidence without limitation. *One of the reasons pointed out (Record 186-187) at the time of the introduction of the letters was that the letters were important to show that both writings constituted one agreement; the very purpose for which this Court considered the correspondence.*

However, counsel for appellant at the time pointed out that there were other purposes for which the letters were introduced (Record 186-187) and the trial court in nowise limited the jury's consideration of these letters. Nevertheless, after argument of counsel to the jury, the trial court (Record 364-365) stated that the letters should not be considered by the jury upon the fact issues submitted and in effect stated that they were important only for the purpose of determining the contract between the parties. Appellant's counsel excepted to the instruction of the court (Record 367-371) and the action of the trial court in this connection is made the basis of appellant's Sixteenth Specification of Error (Brief, page 22), and is argued at pages 113 to 115 thereof. So actually, the letters were not excluded from the Record by the trial court. The jury was only instructed that it should not consider the letters for the purpose of [fol. 450] determining the two fact issues submitted. They remained a part of the Record for all other purposes and were properly before this Court for consideration. Counsel for appellant raised no objection to this Court's consideration of the letters in the submission of the cause and certainly the trial court's statement in his findings, made long subsequent to the trial, that they were excluded, is not borne out by the Record and cannot supply the want of an order made during the trial. This is not the proper office of findings of fact. Evidence cannot be withdrawn from the Record in this manner. Such limitation as the trial court did place upon the letters in connection with the jury's consideration of the issues of fact, was duly excepted to at the time, and was, we believe, clearly error, though, of course, this limitation is in nowise material to the consideration of the letters by this Court in determining the questions upon which this Court based its judgment reversing the action of the trial court.

4. The contention is next made that this Court's findings and conclusions, *based upon undisputed evidence*, were improper; that it was without power to find the facts since no findings were made upon the facts involved by the trial court. This contention is manifestly unsound. At the conclusion of the evidence appellant moved the court for an instructed verdict, assigning as grounds therefor the very grounds sustained by this Court. Appellants mo ion was overruled, and, after verdict, appellee's motion for an instructed verdict was sustained and judgment entered thereon. The evidence bearing upon the findings made by this Court and the conclusions based thereon is undisputed in the Record. There was no room for reasonable minds [fol. 451] to disagree with respect thereto. Practically all of the evidence constituted written documents, corroborated by the undisputed testimony of the witness Colfix. Neither appellee nor his counsel undertook to in any manner deny or otherwise explain any of the written instruments. Mr. Morgan's signed postscript to his first letter, which was exhibited to appellant and which was manifestly intended for that purpose since it referred to "your company" (Steel then being an employee of General Mills) admits of but one inescapable conclusion. We quote therefrom:

> "Mr. Steele:
>
> "P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own ararngements. Therefore there is very little for your company to be concerned about regarding this change.
>
> "'Very truly yours, (Sgd.) Cecil A. Morgan.
> Special delivery."

Cases relating to presumptions of regularity or legality or to burden of proof, such as those cited at page 11 of the petition for rehearing, have no application. Presumptions disappear in the face of evidence to the contrary. Any presumption of innocence which might prevail in appellee's favor is completely overcome by the undisputed evidence. Likewise, the burden of proof, if upon appellant, was fully

[fol. 452] met. Although counsel unjustly accuse this Court of making findings on evidence not in the Record, they refer, at pages 16 and 17, to some case which Mr. Christopher is supposed to have tried in the state court which changed his mind upon the law of the case, though the judgment there rendered was not appealed from. *There is not an iota of evidence in the Record upon this subject.* There was certainly nothing in the decision in that case, as we understand it, to justify Mr. Christopher's change of front. Counsel undertook to introduce some proceedings before the Railroad Commission relating to whether common carrier truck rates or common carrier carload rail rates would constitute the base for determining minimum rates for contract carriers and the trial court properly excluded these proceedings from the record (Record 151-152), and no complaint is here made of the trial court's action. Nevertheless, counsel undertake to refer to the excluded record as evidence of their good faith, notwithstanding the inescapable conclusion which must be drawn to the contrary from the undisputed evidence. An examination of the excluded record, even if considered, discloses no justification for their change of front. Certainly no issue of fact is presented.

This case was tried to a jury. The trial court was not required to file findings of fact and conclusions of law and, indeed, findings and conclusions were not proper since the judgment was not based upon the special verdict but was rendered pursuant to an instructed verdict. The holding of this Court in *Selby Oil & Gas Co. et al. v. Railroad Commission of Texas*, 128 F. (2d) 334, cited by appellee, is not in point. In that case the trial was to the court *without a jury.* [fol. 453] It was the duty of the trial court there to determine all issues of fact. The evidence relating to the issue referred to in that case was necessarily conflicting and it was proper for the court to remand the case to the trial court, as it did, for findings thereon. Here this Court has the same power on appeal to pass upon undisputed evidence in considering an assignment based upon the action of the trial court in overruling a motion for instructed verdict as did the trial court, and make findings therefrom, and power to direct the entry of the judgment that should have been rendered by the trial court: *Sun Life Assurance Co. of Canada v. Maloney*, 132 F. (2d) 388, by this Court. This is a question of law, not of fact. Counsel in their motion

for rehearing do not even pray for a remand for any purpose. They only ask that the judgment of the trial court *based on an instructed verdict for appellee* be affirmed. Nevertheless, there is no issue of fact to be determined by the trial court.

5. It is claimed that the decision of this Court is contrary to its former holding in *Battles v. Braniff Airways*, 146 F. (2d) 336, and *Bowen Motor Coaches v. New York Casualty Co.*, 139 F. (2d) 332, and contrary to the decision of the Court of Appeals of the District of Columbia in *Simmons v. Simmons*, 19 F. (2d) 690. The holdings of this Court are not in conflict with the Bowen Motor Coaches and Braniff Airways cases. The holdings in these cases are properly distinguished in this Court's opinion. *Simmons v. Simmons* was expressly overruled by the court which decided it, in the later case of *Goodloe v. Hawk*, 113 F. (2d) 753. See pages 756 and 757. After discussing *Simmons v. Simmons* [fol. 454] and a subsequent decision of the court (*Frey v. Frey*, 59 F. (2d) 1046, reluctantly following it) the court said:

> "We think it proper to here re-examine the rationale of these decisions.'

After doing so, the court said:

> "We think it may now be stated that the *general* public policy in this jurisdiction, as judicially interpreted, no longer prevents application in annulment actions of the laches and estoppel doctrines in determining the effect to be given to such divorce decrees."

This is a complete answer to counsel's argument built up around the doctrine announced in Simmons v. Simmons. Nevertheless, even the holding in Simmons v. Simmons does not aid appellee here. Under that holding appellee might not have been precluded from bringing an action to set aside or annul the supplemental contract, *before performance* (if illegal as claimed), but would certainly be precluded from any "other or further relief" such as here sought.

6. This Court correctly held that Paragraph 13 of the contract relied upon by appellee never constituted the

real agreement of the parties; that prior to performance of the agreement it was supplemented by the provision whereby appellee was to receive cost plus 10% for the transportation services rendered by him—the real and true agreement between the parties at all times; and that no cause of action was given under the statute to appellee to [fol. 455] recover the difference between the contract rates actually paid and accepted and the alleged Railroad Commission rates. As pointed out by this Court, there was and could be no discrimination in the matter of rates since appellee was a contract carrier, hauling only for General Mills. There were no other customers in whose favor, or against whom, he could discriminate. The statute did not give appellee a cause of action; it was merely for the benefit or protection of a common carrier to prevent a contract carrier performing similar services from underselling it. There is no public interest here involved in so far as the rates charged General Mills by Steele are concerned. Neither is there a statute nor a regulation of the Commission, such as pointed out by this Court in cases involving common carriers in interstate commerce, requiring the contract carrier to sue for and collect the minimum rate prescribed by the Commission. Therefore, the common carrier cases such as *L. & N. Ry. Co. v. Central Iron & Coal Co.*, 68 L. Ed. 900, *Railway Co. v. Fink*, 63 L. Ed. 1151, and *Texas Central Ry. Co., v. Kerns*, 108 S. W. 187, and other similar cases, are not in point.

West Texas Compress Co. v. Railway Co., v5 S. W. (2d) 588, and *Commission v. Uvalde Construction Co.*, 49. S. W. (2) 113, are also cited by counsel. Neither of these cases is in point. In the Uvalde Construction Co. case it was merely held that the court could enjoin a rate of the Commission because it was arbitrary but could not itself prescribe a different rate. The Compress Company case did not involve rates but merely involved the validity of a rule of the Commission with respect to stoppage of cars in transit for the contents to be compressed. It was held [fol. 456] in effect that the rule adopted *pursuant to properly delegated legislative authority* had the effect of law. This we do not question.

Central Freight Lines v. C. & S. Motor Freight Lines, 125 S. W. (2d) 615, is not in point. It involved the right of the court to enforce an *executory illegal agreement*.

This Court did not hold, and it is not even contended, that an executory illegal agreement can be enforced by the court. On the other hand, the holding of the court in the cited case is against another contention here made by appellee to the effect that a court may not determine the validity of an order of the Commission in an action involving its enforcement.

The case of *Federal Life Insurance Co. v. Hoskins*, 185 S. W. 607, cited by counsel in support of appellee's contention, is *contra* to their contention and expressly supports the holding of this Court. We quote from the opinion at page 609:

> "Without reference to the provisions of the statutes penalizing the giving of rebates, and aside therefrom, the rule declared by the great weight of authority is that as long as an illegal contract is *executory* money or other thing of value paid thereon may be recovered. McCall v. Whaley, 52 Tex. Civ. App. 646, 115 S. W. 658, and cases cited. This is so because such a suit is a disaffirmance of the unlawful undertaking, and is sustained for the same reasons of public policy that deny *either guilty party any relief when the unlawful undertaking is consummated.*" (Italics ours.)

[fol. 457] Here the contract has been fully performed in accordance with its terms, has terminated, and appellee has been paid thereunder in accordance with its terms. *It is no sense executory.* The law will leave appellee where it finds him.

Appellee also cites and quotes from a portion of 10 *Texas Jurisprudence* at pages 238 and 239, in which it is said that:

> "Relief will be granted to parties to illegal contracts who are not *in pari delicto* and even as between the parties *in pari delicto* if public policy demands it."

This begs the question. It is only in rare and exceptional cases that public policy requires a court to grant relief as between parties in pari delicto from a fully executed illegal contract. These elements are not present here; public policy does not require it and the statute does not give appellee a cause of action. The text quoted from cites *Wright v. Wight & Wight*, 229 S. W. 881, which

directly sustains our contention. We quoted in part from the opinion in that case:

> "If it be conceded that the transaction in question violated the law mentioned (although we regard it as debatable), yet the appellees were parties thereto and transgressors of section 22 of the same act (article 4896), which made it unlawful for any agent 'to grant or contract for * * * any position or any valuable consideration or any inducement not specified in the policy contract of insurance.' Under section 22, any one so offending is declared guilty of unjust discrimination. So all of the parties are in pari delicto in an [fol. 458] unlawful agreement which the pleading and agreed facts discloses has been fully executed. This being true, the courts will leave the parties where it finds them. They will extend no aid to recover back money paid under such an illegal and forbidden contract. Seeligson v. Lewis, 65 Tex. 217, 57 Am. Rep. 593; Robertson v. Marsh, 42 Tex. 151; Glen v. Mathews, 44 Tex. 405."

In answer to the contention that public policy would be better promoted by permitting a recovery to the insurance agents than in denying it, the court further said:

> "Appellees say, however, they should be allowed to recover because the public interest will be better promoted by granting than by denying them relief. It is true that as between parties in pari delicto relief will be granted if public policy demands it. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is served. The relief is granted to discourage such transactions by others.
>
> "But, we think, the public interest will be just as well served by denying a recovery to the appellees as it would be by granting such recovery and imposing the loss upon the appellants. Insurance agents will be discouraged from making and carrying out discriminatory agreements when they know that the courts will not allow them to recover back money which they have expended in pursuance of such forbidden contracts."

[fol. 459] As previously pointed out, this case does not involve a discriminatory rebate in which the public is interested. It involves a private contract of carriage in which the contract carrier was only permitted under the law to haul for General Mills. The record conclusively shows General Mills would not have entered into the agreement on the basis of the asserted Commission rates. It would have kept its trucks and continued, as it did before, to haul its own products.

The pains and penalties provided for by statute against the alleged illegal arrangement are certainly ample to protect the State and, if enforced, to deter others from making other similar illegal arrangements. *American Natl. Ins. Co. v. Tabor*, 230 S. W. 396 at p. 399. Likewise, unscrupulous contract carriers will be discouraged from making arrangements such as here involved (if illegal) when they know that they must stand by the arrangements as made, so far as the parties are concerned, when they are fully consummated. To permit a recovery here would constitute an invitation to an unscrupulous contract carrier to bid less than the alleged lawful rates for business on the theory, that after having obtained the business and received payment in accordance with the contract terms, he could still nevertheless recover the alleged lawful rates; thereby destroying competition from scrupulous contract carriers. The Texas Court of Civil Appeals in *Wright v. Wight & Wight*, supra, quoted from and followed the opinion of the Circuit Court for the Third Circuit in *Equitable Life Assur. Soc. v. Reilly & Wetherill*, 127 F. 947, which we submit is in point and to which we refer.

[fol. 460] The remaining case cited by appellee to which we have not referred is *Prudential Life Isurance Co. v. Pearson*, 188 S. W. 513. The parties there were not in pari delicto. The person suing for the cancellation of a note obtained the relief sued for on the ground that he received no consideration for the note. The law did not prohibit the execution of the note. It merely condemned the stock issued pursuant to the note.

7. This Court assumed, without discussing the question, that the Railroad Commission by lawful order sought to, and did apply common carrier rates to the transportation services involved. It also omitted any discussion of the constitutional questions involved. We adhere to our same position with respect to these questions as before

stated without repeating such contentions at this time, and have confined this reply to the questions discussed by the Court and presented in appellee's petition for rehearing without waiving any of our previous contentions.

[fol. 461] We respectfully submit that the petition for rehearing should be overruled.

Charles E. France, First National Bank Building, Oklahoma City, Oklahoma; Alfred McKnight, 1500 Sinclair Building, Fort Worth 2, Texas.
Attorneys for the Appellant, General Mills, Inc.

A copy of the foregoing reply has been delivered to Messrs. Cecil A. Morgan and T. S. Christopher and to the firm of Culbertson, Morgan, Christopher & Bailey, all of Fort Worth, Texas, attorneys for appellee, of which I hereby certify.

Alfred McKnight.

[fol. 462] Opinion on Petition for Rehearing—Filed February 15, 1946

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11313

General Mills, Inc., Appellant,

versus

Leo H. Steele, Appellee

Appeal from the District Court of the United States for the Northern District of Texas

(February 15, 1946)

On Petition for Rehearing

Before Waller and Lee, Circuit Judges

Per Curiam:

We are indebted to the Attorney General of the State of Texas for his able brief as *amicus curiae* on the petition for rehearing.

The suit here was not one to enforce, to rescind, nor to enjoin an executory or uncompleted contract. It was a suit by one party, in *particeps criminis*, against another in like situation, under a fully completed contract, wherein it was sought to penalize one party to the extent of $37,000.00 and to reward the prime offender in like amount. We refer to the Appellee as the "prime offender" for the reason that it was he, who got the permit from the Railroad Commission of the State of Texas, who used the highways of the State, and who engaged in the business of contract transportation which the Texas law sought to regulate. Although we do not undertake to measure the degree of *delictum*, it certainly cannot be insisted that the shipper had a greater responsibility to the public than the certificate holder, or truck operator. The statutes of Texas allow recovery of a penalty against both parties at the suit of the Attorney General, which penalty would go to the State of Texas, and not to a violator of the law. We [fol. 463] have been cited no case in Texas that compels the conclusion that where the Court finds both parties in *pari delicto* under a *contract that has been fully executed* it should lend its aid to one in preference to the other. The law of Texas is to the contrary. See *Wright vs. Wight & Wight*, 229 S. W. 881.

In 10 Tex. Jur., page 242, § 140, there is this statement:

> "Recovery of Money or Property Parted With.—Where an illegal contract has been fully executed, the courts will not interfere to litigate the claims of parties *in pari delicto* who have been injured thereby; neither a court of law nor a court of equity will aid either party to recover or reinvest himself with any title or interest vested in the other, but will leave them in the same position as to vested interests as they, by their own acts, have placed themselves. So money paid under an illegal contract may not be recovered back, where the contract has been fully executed and the parties are *in pari delicto*."

See also 12 Amer. Jur. page 725 § 213.

This is also the law as announced in Federal courts. In *Spring Company vs. Knoulton*, 103 U. S. 49, the Supreme Court cited recognized texts on contracts in support of the same rule announced in *Wright vs. Wight & Wight*,

supra, and also quoted the following statement from one of those texts on contracts:

> "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are in pari delicto neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of in debitatus assumpsit for money had and received."

The petition for rehearing is

Denied.

[fol. 464] ORDER DENYING REHEARING

Extract from the Minutes of February 15, 1946

No. 11313

GENERAL MILLS, INC.,

versus

LEO H. STEELE

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 465] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 27, 1946.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ:

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 5 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 79

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No._____

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No._____

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Fifth Circuit entered after rehearing on February 15, 1946, reversing, with directions, the decree of the District Court of the United States for the Northern District of Texas entered December 26, 1944.

OPINIONS BELOW

The opinion of the court below, filed January 8, 1946, and the opinion on rehearing, filed February 15, 1946, are not yet reported, and for convenience, are printed in an appendix to the brief filed with this petition, marked Appendix "A" and Appendix "A-1" respectively.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C.A. Sec. 347) and under Supreme Court Rule No. 38, Sec. 5.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed January 8, 1946; petition for rehearing was filed January 28, 1946; opinion on rehearing was filed February 15, 1946, and decree entered February 15, 1946. Application for stay of mandate pending application in this Court for writ of certiorari was made February 19, 1946, and order staying the mandate for sixty days pending the application for writ of certiorari in this Court was entered February 21, 1946.

QUESTIONS PRESENTED

The controlling questions presented in this petition are:

1. Whether a contract carrier has such a public duty to collect the tariff rates fixed by the Railroad Commission of Texas for transportation services rendered, and such duty to collect so affects the public interest, as to override a private contract to charge a lesser rate.

2. Whether a contract carrier can incapacitate or estop himself from collecting from a shipper the tariff rates legally fixed by the Railroad Commission, because he made a private contract with the shipper to charge a lesser rate.

3. Whether a contract carrier, who made a second

contract with a shipper to charge a rate, and actually collected a rate, less than that legally fixed by the Railroad Commission of Texas, can recover in an undercharge suit the difference between the amount collected and the amount due under the rate established by the Commission, since the carrier does not rely upon or require the aid of the second contract in his suit.

Specifically it involves the pari delicto rule. Assuming, as the Circuit Court did, that the second contract was illegal and was made for the purpose of evading the rates fixed by the Railroad Commission and that the parties are in pari delicto, would this prevent the carrier from maintaining an undercharge suit for the legal rates, as well as enforcing the original contract which provided that he should collect the rate fixed by the Commission, since the carrier does not seek nor require any aid from the second illegal contract?

4. Whether the Circuit Court of Appeals can decide and determine the rule of public policy in Texas contrary to the legislative enactments, the orders of the Railroad Commission of Texas and the decisions of the Courts of Texas, as well as the decision of the Federal District Court sitting in Texas.

STATEMENT OF THE FACTS

The Railroad Commission of Texas, upon application and after public hearing, granted to petitioner Leo H. Steele, a citizen of Texas, a contract carrier permit to transport for hire the commodities of respondent General Mills, a Delaware corporation, over Texas high-

ways. The application addressed to the Commission provided:

> "Applicant proposes that the tariff to be charged for the service proposed to be rendered will be that as promulgated by the Railroad Commission of Texas." (R. 70.)

The order and the permit issued by the Commission fixed the rates for the carrier to charge and the shipper to pay. In support of the application for such permit, a written contract, duly executed by the carrier and shipper, was presented to the Commission, which provided the carrier would charge, and the shipper would pay, the rates fixed by the Railroad Commission. (R. 91.) After the Commission issued the contract carrier permit, the Carrier and the shipper entered into a second contract whereby they agreed upon a rate less than that fixed by the Commission. This second contract was not submitted to the Commission (R. 244, 245). Pursuant to the authority granted from the Commission the petitioner began operating on August 1, 1941 and ended on October 31, 1943. The freight charges were collected in accordance with the terms of the second contract. This suit is one for the undercharge in rates, i.e. the difference between the amount actually collected, and the amount due according to the rate fixed by the Commission. The trial court instructed a judgment for the carrier. The shipper appealed to the Fifth Circuit Court of Appeals which reversed the trial court in a divided opinion, in which Judges Waller of Florida and Lee of Louisiana concurred, with Judge Hutcheson of Texas dissenting. The reason assigned in the majority opinion

by the Circuit Court of Appeals was that the carrier had incapacitated or estopped himself from collecting the rate fixed by the Commission because he was a party to the second contract, notwithstanding the carrier did not sue upon nor require any aid from the second contract.

After the original opinion of the Circuit Court of Appeals was entered, and while a motion for rehearing was pending, the Attorney General of Texas filed an amicus curiae brief asserting that the court's decision relating to rates affected the public interest, and that the State of Texas has declared its public policy, through the Legislature and its courts, contrary to such decision. The motion for rehearing was overruled. The petitioner is informed that the Attorney General of Texas will file an amicus curiae brief in this court supporting the petitioner's application for a writ of certiorari in this case.

REASONS WHY WRIT SHOULD BE GRANTED

1. The case is one of such public importance and exceptional character as to call for the exercise of this court's discretion in granting a writ. Ex Parte Republic of Peru, 318 U. S. 587, 87 L. Ed. 1014. The majority opinion in the Circuit Court of Appeals decided a question of local law in Texas, construing freight rates different from the District Court sitting in Texas, and from the dissenting opinion of Justice Hutcheson, long an able District Judge in the State, and from the opinion of the Attorney General of Texas—ably presented by brief in the Circuit Court.

York Casualty Co., 139 Fed. (2nd) 232. Those were Texas cases where less insurance rates were collected than were fixed by the Insurance Commission of Texas and undercharge suits were filed for the difference. The Fifth Circuit Court of Appeals there correctly held that the legal rate could be collected in the face of Article 571 Penal Code of Texas making such undercharge an offense.

Also, the decision of the Circuit Court of Appeals is in conflict with *New et al v. Denison Clay Co.*, 260 Fed. 70 by the Eighth Circuit Court of Appeals, which court held:

> "A carrier is required by law to collect, and the shipper to pay, the tariff rate on interstate shipments. This mutual obligation of carrier and shipper cannot be affected by mistake, design, or even by positive contract to the contrary. It is a liability arising from and fixed by law, exists independent of contract, and attaches to the status of interstate carriage."

6. The Circuit Court of Appeals held that the carrier could not sue to enforce the rates fixed by the Railroad Commission according to the contract to charge such rates filed with the Commission, for the sole reason that he made a later contract to charge less than the legal rate, even though he did not sue upon or require aid from the later illegal contract.

Such decision is contrary to the law and public policy of this state, as decided by the Supreme Court in *Beer v. Landman*, 88 Tex. 450, where it was held:

"The plaintiff cannot recover whenever it is neces-

> sary for him to prove as part of his cause of action, his own illegal contract or other illegal transaction, but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear and may be important even as explanatory of other facts in the case, he may recover."

As well as the cases of *Hall v. Edwards*, 222 SWR 167, and *Morrison v. City of Fort Worth*, 155 SWR (2nd) 908, all to the same effect.

The Circuit Court of Appeals relied solely upon *Wright v. Wight & Wight*, 229 SWR 881, but the plaintiff in that case required aid from and actually sued on a contract which he alleged was illegal.

The rule is one of substantive law which the United States Courts should follow. *Cities Service Oil Co. v. Dunlop*, 308 U. S. 208.

This Honorable Court recognized it, different from the Circuit Court's decision, in *Armstrong v. American Exchange National Bank*, 133 U.S. 433 (470), where the court held:

> "An obligation will be enforced though indirectly connected with an illegal transaction, if it is supported by an independent consideration so that plaintiff does not require aid of the illegal transaction to make out his case."

7. The Circuit Court of Appeals held that since no discrimination in rates occurred, or could occur, by a contract carrier charging less than the legally fixed rate, public policy did not require that it be enforced, as is required of common carriers.

The decision is contrary to Art. 911b Sec. 22b which includes alike both common and contract carriers as follows:

> "Declaration of Policy. The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

And Section 6aa which reads:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

And to the decision of the Supreme Court of Texas in *Railroad Commission v. Rio Grande & E.P.R. Co.*, 230 SWR 974, that the act was designed to prevent rebates as well as discrimination in rates. And to the decision of the 5th Circuit Court in *Stephenson v. Binford*, 53 Fed (2nd) 509 that:

> "We think that, if a state determines that the business of common carriage by rail and road may no longer, from the standpoint of public interest, be looked upon as a business entirely separate and distinct from that of contract carriers by road, that all of its available carriage services are so bound together and so interdependent that the public may not continue to have a safe and dependable system of transportation unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations, bringing their services into relation with those of common carriers thereon, no just or valid reason exists why it may not do so."

And the decision of this Honorable Court affirming that case, 286 U. S. 374, that:

> "What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less

than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. * * *"

8. The decision of the Circuit Court is in direct conflict with and applies the local law and public policy of the State of Texas differently from the opinion of the Attorney General of Texas, set out and supported by his brief filed in the Circuit Court, he being charged with the duty of enforcing the Motor Carrier Act, as applied to contract carriers, Art. 911b. The correct rule in Texas is stated by the Court of Civil Appeals of Texas in *Harris County v. Hammond*, 203 SWR 445, as follows:

> "(1) While the opinions of the Attorney General are not binding upon the courts, it is a well-recognized rule of decision in this state that when the construction of a statute is doubtful the construction given it by the officers of the state expressly charged with the duty of its enforcement is entitled to great weight, and, unless the court is clearly of opinion that such construction is erroneous, it should not give the statute a different meaning. Ry. Co. v. State, 81 Tex. 602, 17 S.W. 67; Stevens v. Campbell, 26 Tex. Civ. App. 213, 63 S.W. 161."

And it is the duty of Federal Courts to give it the same effect as the State Courts. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1489.

Specifically, the Attorney General stated the public policy and the law of Texas in the Circuit Court as follows:

> "The position of the State of Texas is that an overriding public policy requires strict observance

of its legally prescribed contract carrier rate by contract carriers and shippers in Texas. This higher public policy calls for the intervention of the courts in behalf of the State to enforce through the carrier a contract, to which the shipper was a party, to pay the minimum contract carrier rates of Texas, such contract having been presented to the State administrative agency, the Railroad Commission of Texas, as the basis for the granting of a contract carrier permit, and without which contract and its obligation to conform to the State rate structure, the permit would not have been granted. The ultimate of the State's position is only that the shipper shall pay the minimum rates established by the Legislature of Texas, and embodied in the contract upon which the Railroad Commission granted the permit. 'And this is so for reasons of public policy, and not from regard for the interests of either party * * *' as was said by Associate Justice Stayton of the Texas Supreme Court (Davis v. Sittig, 65 Tex. 497), in discussing the rule that under controlling motives of public policy a court of equity may grant its aid to one of the parties in pari delicto.

"It is because of the public importance of the judgment of the court that the Attorney General of Texas has felt impelled to file this brief as amicus curiae."

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Fifth Circuit Court of Appeals commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals, Fifth Circuit, had in the case numbered and entitled on its docket No. 11313 styled *General Mills, Inc., Appellant, v. Leo H. Steele, Appellee*, to the end that this case may be reviewed and determined by this court as provided for by the Statutes of the United States; and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed with appropriate directions by this court, and for such further relief as to this court may seem proper.

Dated at Fort Worth, Texas this 2nd day of April 1946.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. _____

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The case turned on this question of local law. "This court looks to the trial court for the original examination of local questions, and relies for aid upon the explanations of its conclusions. *Texas-Louisiana v. Arkansas-Louisiana Gas Co.*, 306 U. S. 188-198; 83 L. Ed. 598-604.

2. The Circuit Court of Appeals held that the petitioner, carrier, had incapacitated himself and could not maintain this undercharge suit, because he had entered into an illegal scheme with the shipper to charge and collect a rate less than that fixed by the Railroad Commission, and such point is controlling and decisive of the case.

This decision is in direct conflict with the local laws and public policy of Texas, and elsewhere, as shown by the decisions of the courts of Texas, and the decisions of the United States courts as well as the decisions of the courts of other jurisdictions:

It is in direct conflict with the case of *Texas and New Orleans Railway Company v. East Texas Gravel Company*, 175 SWR (2nd) 435, involving an intrastate shipment where the correct rule was stated as follows:

> "We further recognize that railroad companies are charged with a public duty to collect the full amount of freight charges, according to the rate fixed by the Railroad Commission, and that they cannot by means of estoppel, *or by any other device*, escape performance of this public duty. Texas & N.O.R. Co. v. Yates, 139 Tex. 89, 161, S.W. 2d 1050."

3. The decision of the Circuit Court is in direct

conflict with the decision of the Supreme Court of Texas in *Texas N.O.R. Co. v. Yates, et al*, 161 SWR (2nd) 1050, involving intrastate shipments, where the court held that:

> "The railroad company could not by means of estoppel '*or by any other device*' escape the performance of this public duty."
>
> "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in Houston & T.C.R. Co. v. Johnson, Tex. Comm. App. 41 SW 2d 14, 83 A.L.R. 241."

Since the rule in intrastate rates in Texas is the same as for interstate shipments under the Federal statutes, the decision of the Circuit Court of Appeals is in direct conflict with the decision of the Supreme Court of Texas in *H. & T.C.R. Company v. Johnson*, 41 S.W. (2nd) 14, where the correct rule is stated by that court as follows:

> "The provisions of the statutes are such as to make the collection of those charges a public duty on the part of the carrier, and to incapacitate the carrier to refund or to remit 'in any manner or by any device' any portion of such charges. Johnson was charged with knowledge of these statutory provisions and of their legal effect. He relied at his peril on the representation that the freight charges had been prepaid; for he was charged with knowledge that the carrier could not by that means evade the public duty, imposed by the statutes, to collect the full amount of charges lawfully due."

4. Since the Texas Courts thus held that the same rule applies to intrastate shipments as applies to interstate shipments under Federal statutes, the decision of the Circuit Court of Appeals is in direct conflict with the decisions of the United States Supreme Court in *L. & N. Ry. v. Central Iron and Coal Company*, 265 U. S. 59, 68 L. Ed. 900 where the correct rule is declared that:

> "No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statutes of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

And with the decision of this Honorable Court in N. Y., *New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 51 L. Ed. 515, where it was held:

> "The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purposes of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all'."

To the same effect is *Pittsburg C.C. & S.L.R.R. v. Fink*, 250 U. S. 577, 63 L. Ed. 1151.

To the same effect is the decision of the Fifth Circuit Court, directly contrary to its decision in this case, in *Western Grain v. St. Louis, San Francisco Co.*, 56 Fed. (2nd) 160.

The decision of the Circuit Court is likewise contrary to the uniform decisions of the courts of all the other jurisdictions, in the particulars above set out, as shown by the cases annotated in 83 A.L.R. pages 245 et seq which are summarized in *Georgia R. Co. v. Greety*, 5 Ga. App. 424, 63 S.E. 528, where the court held:

> " 'Some of these cases, and among them the Georgia case of Savannah, F. & W.R. Co. v. Bundick (1894) 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S.E. 995, supra, refer to the principle that, where the parties have agreed to violate the laws, the courts will not allow an action as to that matter in favor of either of them; and from this it might seem at first blush that, the shipper and the carrier having contracted for the transportation of the goods at a rate the very charging or accepting of which is a violation of law, the whole contract of transportation would be unlawful, and that the courts would not give aid to a carrier seeking to collect for the transportation charges or any part thereof, where it becomes necessary for the carrier to assume the role of plaintiff. Upon maturer reflection we are of the opinion that this position is untenable'."

5. The decision of the Circuit Court of Appeals conflicts with its decisions in *Battles v. Braniff Airways*, 146 Fed. (2nd) 336 and *Bowen Motor Coaches v. New*

III.

STATEMENT OF THE CASE

This has already been stated in the preceding Petition for Writ of Certiorari, on pages 3, 4 and 5, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that a Delaware Corporation could enter Texas and have its commodities transported over the Texas highways and evade the payment of the freight rates therefor as fixed by the Railroad Commission, by the simple devise of entering into a second contract with the carrier for a lower rate after the Commission had issued a permit and fixed the rate.

2. The Circuit Court of Appeals erred in not applying the standards of rates as fixed by the Texas Legislature and by the Railroad Commission for contract carriers operating on Texas highways when said court refused to allow a carrier to collect said legal rate and in effect allowed a shipper to escape the payment of the legal rate simply because the shipper and the carrier entered into a second contract for a lesser rate.

3. The Circuit Court of Appeals erred in holding that a carrier could incapacitate or estop himself from collecting the freight rates as fixed by the Railroad Commission by entering into a second contract with the shipper for a lesser rate.

4. The Circuit Court of Appeals erred in holding that the public policy of Texas was contrary to the announced public policy as declared by the Legislature, the State courts, the Attorney General and the Federal District Court sitting in Texas.

5. The Circuit Court of Appeals erred in holding that a carrier was estopped from collecting the legal freight rate fixed by the Railroad Commission because the carrier had entered into a second contract for a lesser rate, since the carrier did not rely upon nor seek the aid of the second contract.

6. The Circuit Court of Appeals erred in holding that the public interest in freight rates did not override the pari delicto rule.

7. The Circuit Court of Appeals erred in holding that a carrier did not have a right and a duty to collect from a shipper the rate as fixed by the Railroad Commission for the transportation of the shipper's commodities over Texas highways.

8. The Circuit Court of Appeals erred in deciding this case upon facts and issues not considered by the trial court.

V.

ARGUMENT AND AUTHORITIES

This is a simple freight rate rebate case. The case is in the Federal Court because of the diversity of citizenship of the parties and in such instances the Federal Courts should apply the State law *Guaranty Trust Company v. York*, 65 Sup. Ct. 1464, 89 L. Ed. ..... The facts are not in dispute. Simply stated, the material facts are: the petitioner, a contract carrier, hauled the commodities of the respondent, the shipper, over Texas highways under authority of a permit issued by the Texas Railroad Commission. The Commission in 1931 promulgated General Order No. 25 and amended the same by Class and Commodity Tariff No. 1-A in 1940 relating to common and contract carrier rates. Both of said orders may be found in the appendix to this brief, referred to as Appendix "C" and "C-1" respectively. Pursuant to a written contract between the carrier and shipper in this case which provided that the parties would charge and pay the rates fixed by the Commission, and likewise pursuant to a written application addressed to the Commission, which provided that the Commission should fix the rates, the Commission did—after public hearing—grant the permit and fixed the rates as the minimum contract carrier rates pursuant to the statutory enactment of the Legislature, and pursuant to its own general rate Order No. 25 under Class and Commodity Tariff No. 1-A. The permit was dated July 9, 1941 (R. 130). Twenty-two days later, namely July 31, 1941, the carrier and the shipper entered into a second contract at

Oklahoma City (R. 208) which provided that the carrier would charge and the shipper would pay a rate less than the one provided by the Railroad Commission. This suit is for the difference between the contract rate and the commission rate.

TWO QUESTIONS OF LAW CONTROL

There are two controlling and related questions of law in this case; (1) Is petitioner (the carrier) estopped or incapacitated from prosecuting this suit against the respondent (shipper) to collect the tariff rates legally fixed by the Commission, solely because he entered into a second contract to charge and did charge and collect from respondent a lesser rate, (2) Since petitioner did not sue upon or seek or require any aid from the second contract which provided for a rate less than the rate legally fixed by the Commission, but made out his case without reference to this second contract, is he thereby prevented or estopped to recover the legal rate even though he be in pari delicto?

The majority opinion of the Circuit Court of Appeals decided both questions adversely to the petitioner, with Justice Hutcheson dissenting. The judgment of the Circuit Court is contrary to and directly in conflict with the enactments of the Texas Legislature, the decisions of the State courts, the opinion of the Attorney General and the decision of the trial court sitting in Texas.

ARGUMENT

(Specifications of Error 1, 2, 3, 4
and First Law Question)

The Supreme Court of Texas in the early case of *Railroad Commission v. Weld & Neville*, 95 Tex. 405, 73 SWR 532, announced the rule as follows:

> "The Railroad Commission Law deprived railroad companies of the power to make rates and conferred that authority upon the commission, * * * the rate-making power is taken away from the carriers altogether, and vested exclusively in the commission."

A more recent case is that of *Railroad Commission v. Uvalde Construction Co.*, 49 SWR (2nd) 1114, wherein the court said:

> "If the carrier were authorized to initiate rates or to fix same by contract with shippers, clearly the court could properly impose such a condition, precedent to granting the injunctive relief sought. But no such power obtains in this state. Here the Railroad Commission itself fixes the rate, and that rate is conclusively presumed to be reasonable, just, and not discriminatory, until declared otherwise by a court of competent jurisdiction."

In the case of *Texas and New Orleans Railway Company v. East Texas Gravel Company*, 175 SWR (2nd) 435, involving an intrastate shipment the correct rule was stated as follows:

> "We further recognize that railroad companies are charged with a public duty to collect the full

> amount of freight charges, according to the rate fixed by the Railroad Commission, and that they cannot by means of estoppel, or by any other device, escape performance of this public duty. Texas & N.O.R. Co. v. Yates, 139 Tex. 89, 161 SWR (2nd) 1050."

Likewise, the Supreme Court of Texas in the case of *Texas & N.O. Ry. Co. v. Yates*, et al 161 SWR (2nd) 1050 involving intrastate shipments the court held:

> "The railroad company could not by means of estoppel 'or by any other device' escape the performance of this public duty."
>
> "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in Houston & T.C.R. Co. v. Johnston, Tex. Com. App. 41 SW (2nd) 14, 83 A.L.R. 241."

Therefore, in Texas a carrier not only has a right to maintain a suit for undercharge in freight rates, but a duty to collect such rates. The Texas courts apply the same rule to intrastate rates as are applied to interstate rates by the Texas courts.

The decision of the majority opinion of the Circuit Court of Appeals therefore is not only in conflict with the Texas courts, but likewise in conflict with the Eighth Circuit Court of Appeals in the case of *New et al v. Denison Clay Co.*, 260 Fed. 70, where it was held:

> "A carrier is required by law to collect, and the shipper to pay, the tariff rate on interstate ship-

ments. This mutual obligation of carrier and shipper cannot be affected by mistake, design, or even by positive contract to the contrary. It is a liability arising from and fixed by law, exists independent of contract, and attaches to the status of interstate carriage."

An interesting case that cites with approval the Denison Clay case above is that of *Bottemueller v. Wilson & Co.*, 57 Fed. Sup. 766, wherein it was said:

"Quite obviously the suit is one on a hauling or transportation contract. The plaintiff undertook to perform certain services for the defendant for a compensation set out in schedules attached to a written contract. The schedule of charges did not agree with published rates filed by the plaintiff and promulgated by him as an interstate contract carrier by motor. Under such circumstances the published tariffs superseded the agreed rates and entered into and became a part of the contract just as effectively as if written therein.

"In the instant case, the plaintiff, being a contract carrier, agreed with the defendant to transport its products for compensation specified in a schedule attached to the contract. The published rates filed by the plaintiff, however, superseded the contract rates and fixed compensation to be paid the plaintiff by the defendant just as effectively as if the identical rates had been incorporated in the written agreement. The liability was not a statutory liability but a liability accruing against the defendant for services rendered by the plaintiff in transporting its merchandise and would have existed wholly apart from the contract. * * *"

"It was the hauling service that he performed for the defendant and not the statute which gave him

the right to claim compensation. All the statute did was to regulate and fix the amount of compensation to be charged and to forbid the plaintiff from collecting a lesser amount."

The Texas Supreme Court in the case of *H. & T.C.R. Company v. Johnson*, 41 SWR (2nd) 14, held:

"The provisions of the statutes are such as to make the collection of *those charges a public duty on the part of the carrier, and to incapacitate* the carrier to refund or to remit 'in any manner or by any device' any portion of such charges. Johnson was charged with knowledge of these statutory provisions and of their legal effect. He relied at his peril on the representation that the freight charges had been prepaid; for he was charged with knowledge that the carrier could not by that means evade the public duty, imposed by the statutes, to collect the full amount of charges lawfully due."

The law fixing the rights and duty of a carrier to collect and the shipper to pay the rates as prescribed by the Commission applies both to rail transportation and truck transportation.

In *L. & N. Ry. v. Central Iron and Coal Company* 265 U.S. 59, 68 L. Ed. 900 the correct rule is declared that:

"No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statutes of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

In the case of *Herrin Transportation Company v. Marmion*, 113 SWR (2nd) 291, plaintiff sued on a private contract, one that provided for a rate less than the rate prescribed by the Railroad Commission, identical in principle with this case. The carrier insisted upon applying the rate as fixed by the Commission, notwithstanding that he had made a contract with the shipper for a lesser rate. Addressing itself to this private contract that provided for a rate different to the one fixed by the Commission, the court said:

> "The alleged contract was void, and gave no right of action to appellee for its breach. Wardlow v. Andrews, Tex. Civ. App., 180 S.W. 1161; Fort Worth & R.G.R. Co. v. Burns, Tex. Civ. App., 242 S.W. 295, 296; Wichita Falls & W.R. Co. v. Asher, Tex. Civ. App., 171 S.W. 1114."

To like effect see the case of *Central Freight Lines, Inc. v. C. & S. Freight Lines, Inc.*, reported in 125 SWR (2nd) 615. In that case a private contract was entered into between the parties which was never submitted to nor approved by the Railroad Commission and concerning this private contract the court said:

> "The private agreement between appellant and appellee * * * never became binding * * *. It would be a violation of both the letter and spirit of the statute above cited to permit parties by private agreement, unapproved by the Railroad Commission, to restrict the service to be rendered the public under such certificates of convenience and necessity so issued by the Railroad Commission and to enforce such agreements in the district court without joining the Commission as a party thereto,

as was done in this case. It would result in stripping the Railroad Commission of its right to regulate traffic on the highways and would take from it the authority to provide for the convenience of the public in the transportation of freight."

The original application for the contract carrier permit addressed to the Commission was dated August 26, 1940. This application provided:

"Applicant proposes that the tariff to be charged for the services proposed to be rendered will be that as promulgated by the Railroad Commission of Texas."

The original contract between the carrier and the shipper was dated August 26, 1940 (although it was not executed until sometime later), which contract provided in part:

"11. First party agrees to promptly comply with all laws, rules and regulations applicable to the conduct of said business as a contract motor carrier, including and without excluding any other applicable law, rule or regulation, those of the State of Texas and any department or governmental sub-division thereof, all general laws and applicable ordinances or regulations of cities or towns to or through which products of second party may be delivered or transported hereunder." (R. 120.)

"13. It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of

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Wright v. Wight & Wight, 229 SWR 881 23

STATUTES

Revised Civil Statutes, Article 4894 28
Texas Penal Code, Sec. 571 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No._____

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, styled *General Mills, Inc., Appellant, v. Leo H. Steele, Appellee,* is not yet reported in the Federal Reports, but may be found in the record filed in this suit. (R. 409 and 466.)

II.

JURISDICTION

This has been stated under subdivision II in the preceding Petition for Writ of Certiorari, to which reference is here made, and, therefore, will not be repeated here.

> rate is that which the carrier must exact and that which the shipper must pay.' Kansas City Southern R. Co. v. Carl, 227 U. S. 639. 'The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier.'" (citing many cases)

The court then proceeded to cite the case of *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 83 L. Ed. 953, in which the Supreme Court of the United States said:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates. The lawful rate as established by the rates and schedules filed by the carrier must be collected. (citing cases) The established rates are a matter of public right, and only the running of the statute of limitations can preclude a carrier from recovering the full amount."

California has a statute similar to Texas relating to contract carriers, and in the case of *Gardner v. Rich Mfg. Co.*, 158 Pac. 23, a case involving contract carrier rates where a private contract had been made, the court simply held that the schedule of minimum rates established and prescribed by the rules and regulations

of the Commission became a part of every contract between the carrier and the shipper.

To permit the judgment of the Circuit Court of Appeals to stand, is to set aside and annul the rates fixed by the Commission, and to create the very discrimination and rebates which it is the purpose of the statute to prevent.

The majority opinion failed to take into consideration, or at least it did not even discuss, the public policy of the State of Texas. By its refusal to allow the carrier to collect from the shipper, the court allowed a collateral attack on the orders of the Commission to be sustained and allowed the shipper to establish its own rate different to that of the Railroad Commission. Thus the court in this method placed its stamp of approval upon a transaction which it declared to be void and illegal. This decision by the majority opinion of the Fifth Circuit Court on this point is the only one of its kind that we have been able to find in any jurisdiction, state or federal, by any court. We invite this court's attention to the dissenting opinion of Justice Hutcheson, and particularly that portion where he said:

> "But if I could agree that there was a deliberate intent to defraud the statute, I still could not agree with the majority, whether plaintiff's suit is to be regarded as on the written contract which was exhibited to and filed with the Commission, or on the right arising out of the statute to recover the legal charges for the services rendered, for the right to recover the legal charges and no other rests on an overriding public policy. This policy is so imperative that it may not be defeated by the

conduct of the parties in entering into legal and evasive arrangements which it is the very purpose of the policy to strike down. * * * It seems clear to me that plaintiff's suit is on the contract, which the parties made and exhibited to the Commission, and in which they agreed to pay the legal rates, and that the case is ruled by Central Freight Lines v. C & S Motor Freight Lines, 125 SWR (2nd) 615."

RIGHT AND DUTY OF CARRIER TO THE LEGAL RATE

We respectfully submit that the Texas law is mandatory, that the shipper must pay and the carrier must collect the rates as fixed by the Railroad Commission as established by the authorities above cited as they relate to shipments by the truck carriers and rail carriers. The same rule applies to the insurance companies of Texas as stated in the case of *Brown & Root v. Traders & General Ins. Co.*, 135 SWR (2nd) 534, wherein it was said:

"A carrier of workmen's compensation insurance and its policy-holder necessarily contract with each other that the premium rate shall be the duly and lawfully prescribed rate for the risk involved, and none other. They are without power by contract, or otherwise, to alter such prescribed rate. So, if the parties may not consciously and intentionally change the lawfully prescribed rate, their knowledge, ignorance, or negligence is equally incompetent to work any such change. Therefore, the collection by the insurer of a higher or lower rate than that which is duly and lawfully prescribed

for the risk involved constitutes a breach of the insurance contract for such insurer to collect only the duly prescribed rate. And, of course, a suit for reparation for overcharges or undercharges is simply and purely a legal action, with no question of reformation of contract, or other equity involved in it. In other words, *if a carrier of workmen's compensation, for instance, had collected a lower premium rate than was lawfully prescribed for carrying the risk involved, and later discovered such error, it would certainly not have to prove that it was not negligent in collecting the unlawful rate, in order to entitle it to collect the only rate which the law authorized or permitted it to collect;* neither would it be necessary for such insurer to have the policy of insurance reformed to specify such lawful rate, for the contract by force of law intends that the premium rate, and only the premium rate, which applies to carrying the risk involved is agreed rate."

In the majority opinion we find the following statement:

"The statute does not expressly authorize a suit for the recovery of the prescribed rates by anyone * * * In the instant case the statute was not for the benefit of contract carriers but for the benefit of common carriers."

Therefore, the majority conclude that there was no right nor duty on the part of the contract carrier to collect the rates as prescribed by the Commission.

The Texas Statute relating to Railroads

"does not expressly authorize a suit for the recovery of the prescribed rates by any one, etc."

Yet we call attention to the uniform holdings of the Texas courts that the rail carriers not only have the right but the public duty to prosecute such suits. (See authorities above cited.)

The Insurance Statute of Texas "does not expressly authorize a suit for the recovery of the prescribed rates by any one, etc." Yet the Fifth Circuit Court in *Battles v. Braniff Airways*, 146 Fed. (2nd) 336, and *Bowen Motor Coaches v. New York Casualty Company*, 139 Fed. (2nd) 332, have held that such suits may be maintained. Furthermore in the Herrin Transportation Company case, above, relating to a truck carrier the statute "does not expressly authorize, etc." Yet the court applied the rates as fixed by the Railroad Commission. The complete answer to this strange pronouncement of the Circuit Court of Appeals is found in Section 22b, Article 911b which declares the public policy for *all* motor carriers. The Legislature made no distinction between common carriers and contract carriers. The Texas courts have made no distinction between common carriers and contract carriers. The same rule applies to both. The attempt by the Circuit Court to make a distinction finds no support in Texas, but on the contrary the statute declares the same rule for all carriers.

The law of Texas is binding on the Federal Courts.

> "The source of substantive rights enforced by a federal court under diversity jurisdiction is the law of the state, and whenever that law is authoritatively declared by a state, whether by the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the

forum of the application is a state or a federal court, and whether the remedies be sought at law or may be had in equity." Guaranty Trust Co. of N. Y. v. York, N. Y., 1945, 65 S.Ct. 1464, 89 L. Ed.....

ARGUMENT

(Specifications of Error 5, 6, 7, 8, and Second Law Question)

The Circuit Court of Appeals held that the carrier could not recover from the shipper because the parties were in pari delicto. This decision by the Circuit Court is contrary to the Texas law, and completely overlooked the fact that the carrier was not required to rely upon this second contract to make out his case. The carrier did not seek nor require the aid of this second contract which was brought in by the shipper who by its use collaterally attacked the legal freight orders of the Commission. An early Texas case, namely *Beer v. Landman*, 88 Tex. 450, announced the law in Texas, wherein the Supreme Court held:

> "The plaintiff cannot recover whenever it is necessary for him to prove as part of his cause of action, his own illegal contract or other illegal transaction, but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear and may be important even as explanatory of other facts in the case, he may recover."

In the instant case the carrier was not obliged to prove his own illegal act, that is, the second contract. He relied entirely upon the first contract and the orders

of the Railroad Commission. If there had been no written contract at all between the shipper and the carrier in this case "the law writes the particular rate fixed and authorized by the Railroad Commission of Texas" into every contract of shipment. (*Texas C. Ry. Co. v. Kerns*, 108 SWR 187). There was no escape from this lawful rate, and this second contract could not change the law of Texas, although the effect of the decision of the Circuit Court is that such second contract—though void—should prevail. For a review of the authorities of Texas on this question we refer to the case of *Hall v. Edwards*, 222 SWR 167. Likewise to the more recent case of *Morrison v. City of Fort Worth*, 155 SWR (2nd) 908, in which the Supreme Court was passing on a case where a private contract had been made contrary to the statutory enactments of the Legislature. In 1937 the Legislature of Texas enacted a law fixing a minimum wage scale for working hours for firemen and policemen in certain cities of the State, including Fort Worth. After the law was enacted the City entered into a contract with its firemen for a lesser rate. One of the firemen, who had signed this private contract and who had worked under it for some months, died, and several months later his widow filed suit to recover the difference between the amount paid under the private contract and the amount that should have been paid in accordance with the statutory enactment. The Supreme Court said:

> "In order to establish her cause of action the plaintiff requires no aid from the illegal contract. Under such a record, the illegal contract constitutes no bar to the plaintiff's cause of action. This is be-

cause of the settled rule in this State that, even though a demand is in some way connected with an illegal transaction, still recovery may be had if the plaintiff requires no aid from the illegal transaction to establish his case. Oliphant v. Markham, 79 Tex. 543, 15 S.W. 569, 23 Am. St. Rep. 363; Beer v. Landman, 88 Tex. 450, 31 S.W. 805; Hall v. Edwards, Tex. Com. App., 222 S.W. 167."

The Circuit Court stated that the Federal Law applicable to this case had been announced in the case of *Spring Company v. Knowte*, 103 U. S. 49. An examination of this case will disclose (1) that it was not a rate case, but one concerning the increase of a capital stock of a corporation which the defendants in error conceded that the plan adopted by the company to increase such stock was in violation of the law of the State of New York, and (2) that the plaintiff was required to rely upon the illegal transaction to make out his case. Therefore, it has no application to the case at bar.

For authority in Texas the Circuit Court relied solely upon *Wright v. Wight & Wight*, 229 SWR 881, in which case the court announced the same rule as in the Beer v. Landman case and Morrison case, above, but denied recovery to the plaintiff because the plaintiff was compelled to depend upon the illegal contract to make out his cause of action, while in the instant case, the carrier does not depend upon nor does he seek the aid of the illegal contract to make out his case. Furthermore, in Wright v. Wight & Wight there was no question of public interest. The public interest was not involved. The question was not even pleaded nor considered, while in the instant case the learned trial judge

in his Findings of Fact and Conclusions of Law (R. 88) points out at great length wherein the matter of rates for contract carriers does affect the public interest. In connection with the trial court's Findings of Fact (R. 88-94) and his Conclusions of Law (R. 94-99) and likewise the peremptory instruction of the court (R. 375) we find the trial court has rendered an exhaustive opinion and has completely covered all of the facts. The point upon which the Circuit Court reversed and rendered judgment in this case was not even raised in the trial court. Whether or not a party is violating the criminal laws certainly involves the question of intent as does the question as to whether he is engaging in a corrupt scheme. In any investigation of a criminal act it is a question of fact as to what the parties intended. It certainly cannot be said that the undisputed evidence shows beyond the point where reasonable minds could disagree, that the parties were deliberately violating criminal statutes and engaging in a corrupt scheme. If such issue were in the case it should have been submitted to the trial court and either he or the jury should have been requested to find the facts with respect thereto.

The majority of the Circuit Court of Appeals found:

> "It also is without serious doubt that the substituted paragraph 13, suggested and drawn by Plaintiff's counsel, and setting forth the provision that the applicant would charge the rates fixed by the Commission, was clearly a subterfuge, adopted in order to get by the Railroad Commission, for it was definitely understood that after the permit was obtained this provision would be eliminated

> and the provision which the Appellee now says was illegal, to wit, the provision to pay his expense, plus ten per cent, would be put back into the contract."

This question was not found by the trial court, was not at issue and no request was made to find on it, and the Circuit Court of Appeals was without jurisdiction so to find.

The Circuit Court of Appeals also found:

> "There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.
>
> "We also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties.
>
> "The provision for payment under rates and rules of the Railroad Commission so taken out and discarded never was intended to be, and, therefore, never was, in fact or in law, the agreement of the parties."

These facts were not put in issue, no findings of fact made, and none requested on these issues, and the Circuit Court of Appeals was without jurisdiction to find them as a basis for its judgment entirely different from that of the trial court. Neither party requested any such issues to be submitted and none were submitted and no such findings made.

The very fact that one member of the Circuit Court

> Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." (R. 120-121.)

Based upon the application, which was supported by the contract, the Commission granted its Contract Carrier Permit No. 11449 (R. 130). This permit was based upon an order issued by the Commission dated June 16, 1941 (R. 125). The order and the permit issued by the Commission made applicable to that particular permit the minimum rates prescribed for contract carriers. Therefore, the general rate order of the Commission was made specific as it related to the carrier and the shipper under this particular permit. The rate orders as promulgated by the Commission are binding on both carrier and shipper as was stated in the case of *West Texas Compress & W. Co. v. Panhandle & S. F. Ry. Co.* 15 SWR (2nd) 558, "the rates promulgated by the Commission have the same force as a like enactment of the Legislature itself." Likewise all rate orders promulgated by the Commission are written into and become a part of every shipment that is made. Such was the holding in the case of *Texas C. Ry. Co. v. Kerns*, 108 SWR 187, wherein the court said:

> "In every contract of shipment in this state the law writes the particular rate fixed and authorized by the Railway Commission of Texas."

Article 911b, Vernon's Annotated Statutes, Section 1 through 22 (the material parts thereof may be found in the Appendix attached hereto) provide for both com-

mon and contract carrier truck operations over the highways of Texas. Article 6aa thereof provides that the Commission shall prescribe rates for contract carriers, and this court has already had occasion to pass on the authority of the Commission to promulgate rates under said section in the case of *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288, as follows:

> "What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants. (Citing cases.)" * * *
>
> "We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the

> act invalid. Ellis v. United States, 206 U.S. 246, 256, 51 L. Ed. 1047, 1052, 27 S. Ct. 600, 11 Ann. Cas. 589. Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state.

With the law in Texas so firmly established the shipper in this case, a Delaware corporation, came to Texas in search of a contract carrier who would haul a small portion of its commodities, and said shipper required its carrier "to promptly comply with all laws, rules and regulations applicable to the conduct of said business as a contract motor carrier, including and without excluding any other applicable law, rule or regulation, those of the State of Texas and any department or governmental sub-division thereof" * * * and to pay "tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." (R. 120.) Then after having 424,919,582 pounds of its freight moved over Texas highways the said shipper proceeded to pay therefor only $44,804.33, when under the minimum Texas contract carrier rates the carrier should have been paid $77,814.98. Then the shipper came into the United States District Court and pleaded as a defense to the lawfully prescribed rate that it had entered into a second contract with the carrier for a rate less than the one fixed by the Commission, and therefore made a collateral attack upon the orders

of the Railroad Commission and said that it should not be required to pay such lawful rates because it had entered into an illegal and void contract—thus placing itself in pari delicto with the carrier with reference to the second contract. There can be no question that the defense as urged in this case was a collateral attack. *Texas Steel Co. v. Fort Worth & Denver*, 40 SWR (2nd) 78. See also *Railroad Commission v. Interstate Motor Freight*, 77 SWR (2nd) 1100; *Alpha Petroleum Company v. Terrell*, 59 SWR (2nd) 364. It should be kept in mind that this second contract was executed in Oklahoma City, Oklahoma (R. 208). Also this second contract was never submitted to nor approved by the Commission (R. 244, 245).

An interesting case from the State of Massachusetts, which has a motor carrier statute almost identical with that of Texas, is that of *Papetti v. Alicandro*, 58 NER (2nd) 155, in which case the contract carrier, who later changed to a common carrier, contracted with the shipper to charge a rate as promulgated by the Commission and did charge such rate. After the collection of the rate, by private contract the carrier rebated to the shipper the cash according to the terms of the private contract. After discussing the facts and the law at great length the court held:

> "Unless the plaintiff is prevented by some rule of law, he is entitled to maintain this action. We think that the plaintiff not only is not so barred, but that it is both his right and duty to recover the rebates. * * * 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful

understand the majority opinion of the Circuit Court of Appeals in its decision in this case attempts to distinguish it from those two cases on the ground that here there was a corrupt and criminal scheme and the parties were in pari delicto and therefore the public policy which ordinarily prevents either party from recovering under the contract supersedes and is of greater importance than the public policy which will permit parties in pari delicto to sue on the contract where the public welfare would best be served by permitting such suit to be maintained.

Section 571 of the Texas Penal Code provides that:

> "Whoever violates any provision of the laws of this State regulating the business of life, fire, or marine insurance, shall, where the punishment is not otherwise provided for, be fined not less than five hundred nor more than one thousand dollars."

Article 4894, Revised Civil Statutes, is an insurance statute on rebating and discrimination and makes such an offense under the insurance law. Therefore, the insurance cases were clear violations of the Penal Code of Texas.

In *Federal Life Insurance Company v. Hoskins*, 185 SWR 607, a contract was made in direct violation of these statutes and suit was defended on the ground of such violation and allegation of pari delicto. The court allowed a recovery.

The Insurance Statute of Texas "does not expressly authorize a suit for the recovery of the prescribed rates by any one, etc." Yet this same Fifth Circuit Court did allow a recovery. Likewise, in the two cases on insur-

ance above cited from Texas this same Fifth Circuit Court held that the pari delicto doctrine could not apply when the public interest was involved. Yet, in the instant case we find this Fifth Circuit Court completely ignoring the question of public policy and completely ignoring and refusing to consider the fact that the carrier in the instant case was not required to nor did he rely upon any part of this second contract. The majority opinion of the Circuit Court in this case is directly in conflict with a decision by the same court in an opinion rendered by Judge McCord in the case of *Standard Rice Co. v. Southern Pac. Co.*, 139 Fed. (2nd) 93, wherein the court said:

> "The mistake of plaintiff in quoting to defendant the 26 cent rate and which was not applicable can avail defendant no relief. It must pay the applicable rate, the lawful rate. All shippers stand equal under this tariff law of the carriers. The rate measured here to defendant as applicable is and must be the same and the exact rate measured to every other shipper who finds himself confronted with the same facts and conditions." * * *
>
> "Manifestly, the defendant has not been damaged by failure of the carrier to quote to it the applicable rate. Atlantic Coastline Railroad Co. v. Briston Steel & Iron Works, D.C., 30 F. Supp. 726; Texas & Pacific Railway Co. v. Mugg & Dryden, 202 U.S. 242, 26 S.Ct. 628, 50 L. Ed. 1011; Gulf, C. & S.F. Railroad Co. v. Hefley, 158 U.S. 98, 15 S.Ct. 802, 39 L. Ed. 910; Illinois Central R. Co. v. Henderson Elevator Co., 226 U.S. 441, 33 S.Ct. 176, 57 L. Ed. 290; Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853, L.R.A. 1915E, 665."

CONCLUSION

The Attorney General General of Texas filed an able brief as amicus curiae in the Circuit Court and he has filed or will file a similar brief in this court wherein he has pointed out the public policy of Texas and the public interest. Likewise, the Attorney General has pointed out the far reaching and disastrous result of the decision of the Circuit Court in this case. Justice Joseph C. Hutcheson, Jr., an experienced Texas lawyer and District Judge for many years on the Fifth Circuit Court writes an able dissenting opinion. We respectfully submit that his dissenting opinion concerning the public policy of Texas is entitled to great weight.

It is the position of the petitioner in this case that (1) a carrier cannot be incapacitated or estopped from collecting the minimum freight rates prescribed by the Railroad Commission, and (2) that so long as a carrier is not required to rely upon or seek the aid of an illegal contract of which he was a party, that the doctrine of pari delicto cannot apply and that the overriding public policy should prevail.

Respectfully submitted,

LEO H. STEELE
By:
CECIL A. MORGAN
T. S. CHRISTOPHER
First National Bank Building
Fort Worth, Texas
Attorneys for Petitioner

CULBERTSON, MORGAN, CHRISTOPHER & BAILEY
First National Bank Building
Fort Worth, Texas
Of Counsel

CERTIFICATE OF SERVICE

I, T. S. Christopher, attorney of record for petitioner, Leo H. Steele, hereby certify that a copy of the foregoing Petition for Writ of Certiorari and Brief in Support Thereof, has been served upon Charles E. France and the firm of Miley, Hoffman, France & Johnson, whose post office address is First National Bank Building, Oklahoma City, Oklahoma, and Alfred McKnight and the firm of Cantey, Hanger, McMahon, McKnight & Johnson, whose post office address is 1500 Sinclair Building, Fort Worth 2, Texas, attorneys of record for respondent, General Mills, Inc., by personally delivering two copies thereof to Alfred McKnight, one of the attorneys and a member of the firm of Cantey, Hanger, McMahon, McKnight & Johnson, on this 2nd day of April 1946.

.....

T. S. CHRISTOPHER
Attorney for Petitioner

I, Alfred McKnight, one of the attorneys of record for respondent General Mills, Inc., hereby acknowledge receipt of two copies of the foregoing Petition for Writ of Certiorari and supporting brief this 2nd day of April 1946.

.....

ALFRED McKNIGHT
Attorney for Respondent

APPENDIX "A"

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Fifth Circuit

No. 11313

GENERAL MILLS, INC., Appellant,

versus

LEO H. STEELE, Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

(January 8, 1946.)

Before HUTCHESON, WALLER, and LEE, Circuit Judges.

WALLER, Circuit Judge: Appellee agreed to transport, as a contract motor carrier, the merchandise of Appellant for a period of three years, in an area having a radius of 150 miles, for the compensation of his actual expenses plus ten per cent. He performed his agreement until it was lawfully terminated three years later. There was in effect at the time of the making of this agreement, and during the entire three years, a statute, and an order of the Railroad Commission of

Texas, providing that the rates which a contract motor carrier, in competition with a common carrier, could charge should not be less than the minimum rates that a common carrier, performing substantially similar services, could charge.

Before Plaintiff could engage in the business as a contract motor carrier it was necessary for him to make application to, and secure a permit from, the Railroad Commission. In the application for such permit it was at least appropriate, and perhaps requisite, that the applicant should exhibit the contract under which he proposed to engage in such carriage. In conformity with the understanding between the parties, a proposed contract was prepared by Appellant, in which Sec. 13 provided that for such transportation of the Defendant's merchandise the Plaintiff would receive his actual expenses, plus ten per cent. But when this contract was submitted by Mr. Steele to Mr. Morgan, one of his attorneys, the latter, on February 28, 1941, wrote Mr. Steele as follows:

"Dear Mr. Steele:

"Since you left this morning, I have again carefully considered the proposed contract to be entered into between you and General Mills.

"Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

" 'It is mutually agreed between the parties that the rate to be charged by the first party and

paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.

"Mr. Steele:

"P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.
"Special delivery."

On March 27, 1941, Mr. Colfix, the Division Comptroller of General Mills, Inc., after Mr. Steele had shown him Mr. Morgan's letter of February 28, wrote an interoffice communication[1] to Mr. Steele, who was

[1] "March 27, 1941.

"Mr. L. H. Steele,
Wichita Falls.
"Mr. L. B. Colfix,
Oklahoma City.

"You received a letter from your attorney, Mr. Morgan, in which he recommended certain changes in the contemplated contract to be entered into between you and General Mills. The principal change

then an employee of the Defendant, in which he stated, among other things, that if the substitution of the paragraph as suggested by Mr. Morgan were made:

> "It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the rate specified by the Railroad Commission. McCraney had the idea that the Railroad Commission might not promulgate any rates. In that case we would have to have a charge not in conformity with the contract, which might cause difficulty."

On April 3, 1941, Mr. Christopher, a law partner of Mr. Morgan, and one of counsel for the Plaintiff, wrote Mr. Colfix, Division Comptroller for Defendant, stating among other things:

> "For your information and the basis upon which Mr. Morgan's recommendation was made with reference to the paragraph pertaining to rates, the Texas law (Article 911b Vernon's Annotated

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has to do with the method of compensation for trucking services, and it is recommended by Mr. Morgan that the compensation be specified in the contract as follows:

"'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the rate specified by the Railroad Commission. McCraney had the idea that the Railroad Commission might not promulgate any rates. In that case we would have to have a charge not in conformity with the contract, which might cause difficulty.

"I think before we can give further consideration to this form of contract we should know definitely what kind of rates, if any, have been established by the Railroad Commission. Is there any way you can find out what factors they use in determining their rates and to what extent they may be expected to assign rates and when and if your permit is approved?"
"LBC/FH"

Civil Statutes 1925) provides as follows:

"'The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.'

"From the foregoing, you will see that the Statute itself fixes the rate to be charged by contract carriers as 'not less than the rate prescribed for common carriers for substantially the same service.'"

Mr. Christopher then concludes this letter as follows:

"I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or to yourself with reference to this matter the next time Mr. Steele is in the office."

On April 5 Mr. Colfix wrote another interoffice communication to Mr. Steele, suggesting that the latter make arrangements for them to meet with Mr. Christopher at Fort Worth at an early date. This conference was held and concerning what occurred the testimony of Mr. Colfix is undisputed. He testified that:

"I indicated to these gentlemen that the form of contract that they proposed to us was entirely different than the understanding that Mr. Steele

and our company had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally execute a supplemental contract for the type of service that would be rendered by Steele for us."

On April 11, 1941, a letter from Mr. Christopher to Mr. Colfix stated:

"It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges as have been prescribed by the Railroad Commission of Texas, * * *."

Mr. Christopher further stated in this letter:

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supple-

of Appeals disagrees to the point of dissenting, clearly shows that reasonable minds can disagree as to whether these conclusions can be properly drawn from the evidence. The worst that can be said about all of these questions is that they might provoke fact issues if properly raised, and if they are material to a determination of this case, then such fact questions were for the trier of the facts to determine, but the Circuit Court of Appeals has no jurisdiction to substitute its findings of fact for that of the trial court, and to render its judgment based upon its own independent findings of fact. *Seely Oil & Gas Co. v. RRC*, 128 Fed. (2nd) 334.

The point on which the Circuit Court of Appeals reversed and rendered judgment was not even raised in the trial court.

We respectfully submit that the majority opinion of the Circuit Court decided this case upon issues that were not even considered by the trial court. However, if the Circuit Court had applied the correct rule of law in Texas such fact findings on the part of the Circuit Court would have been immaterial. Even if true, which we deny, still such facts would not have prevented a carrier in Texas from collecting the minimum rate prescribed by the Railroad Commission for transportation services.

But we contend that the Circuit Court of Appeals had no jurisdiction to find facts not found by the trial court and not raised by the pleadings nor the evidence and not found from the undisputed evidence in the case, to sustain its conclusion that there was a corrupt and criminal scheme. In the first place the parties are

presumed to have proceeded in a legal manner. This requires no citation of authority. This presumption of the Texas law must be followed by the Federal Court sitting in Texas. *Cities Service Oil Co. v. Dunlop*, 84 L. Ed. 196, 308 U. S. 208. We believe that the Circuit Court of Appeals was without authority to find any such facts as it did in the instant case. *Union Bleachery v. U. S.*, 79 Fed. (2nd) 549; *North American Acc. Ins. Co. v. Anderson*, 100 Fed. (2nd) 452; *McGee v. Nee*, 113 Fed. 2nd) 543.

As was said by this court in *Louisville & N.R. Co. v. Central Iron & C. Co.*, 265 U. S. 59, 68 L. Ed. 900: "No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges."

To like effect see *P.C.C. & St.L.R. Co. v. Fink*, 250 U.S. 577, 63 L. Ed. 1151, where this court held that it made no difference whether the contract for a different rate was made in good faith or bad faith, the result was the same.

We now refer to the conflict between the decision of the Circuit Court of Appeals in this case and its decisions in *Battles v. Braniff Airways*, 146 Fed. (2nd) 336, *Bowen Motor Coaches v. New York Casualty Company*, 139 Fed. (2nd) 232. We can see no valid distinction between this case and the two decisions of the Circuit Court of Appeals from Texas on the insurance law. The two Texas cases decided by the Circuit Court of Appeals were cases where contracts were made for the purpose of obtaining a lower rate than that fixed by the Insurance Commissioner of the State of Texas. We

mental contract be entered into based upon the service rendered."

Mr. Christopher further stated:

"Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and the service actually rendered in comparison to service of common carriers. To me, however, it is simply a reasonable business risk, if it is a risk, which you can afford to take."

On April 17, 1941, the Defendant, by Mr. Colfix, wrote Mr. Christopher, stating, among other things, that:

"After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills."

The real intention of the parties for compensation to Mr. Steele by the payment of expenses, plus ten per cent, was, upon the suggestion, advice, and assurance of the attorneys for Mr. Steele, withdrawn and paragraph 13, as drafted and suggested by Mr. Morgan, was inserted in the writing to be submitted to the Railroad Commission. The inserted paragraph is as follows:

"13. It is mutually agreed between the parties that the rate to be charged by the first party and

paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

The permit was granted to Mr. Steele on July 9, 1941, and on July 31, 1941, the amendatory contract, as contemplated and agreed upon, was executed between Appellant and Appellee, in which paragraph 13 of the prior instrument was amended so as to put into effect that which had been the real agreement all along, namely, to pay the plaintiff his expenses, plus ten per cent for the services to be rendered.

The testimony of Mr. Colfix, the letters aforementioned, the fact that the original contract of August 26, 1940, was promptly amended after the permit was granted, and the fact that Mr. Steele was compensated on the basis of the original agreement for the entire three years, during which there was never any protest from him that it was not in accord with the understanding and agreement of the parties, all show beyond doubt that paragraph 13, as suggested and drafted by Mr. Morgan and inserted in the contract submitted to the Railroad Commission, was never intended to, and did not then, theretofore, or thereafter, express the true agreement of the parties. However, Mr. Steele knew and carried out the actual understanding and performed the services during the

entire period under the re-amended contract, and accepted without protest the agreed compensation of expenses, plus ten per cent. The conclusion is inescapable that the intent and purpose of substituting paragraph 13, as drafted by Mr. Morgan, in lieu of the real agreement, was not to express the intent and agreement of the parties but to serve as an aid in procuring a permit for the Plaintiff from the Railroad Commission. This substitution of paragraph 13 was nothing more nor less than a subterfuge.

It cannot be effectively contended that the contract sued on by the Plaintiff, to-wit, the so-called contract of August 26, 1940, was, in fact, the contract or agreement of the parties, for it appears beyond doubt that the real contract between the parties was the contract of August 26, 1940, as amended by striking out Mr. Morgan's paragraph 13 and reinstating the paragraph that truthfully set out the compensation that the parties had agreed would be paid Steele. This occurred on July 31, 1941. Nevertheless, upon the termination of the contract Mr. Steele, represented by the same attorneys who had advised the entering into of the contract, brought suit against General Mills, Inc., asserting that the agreement for Steele to charge, and for General Mills to pay, less than the minimum rates payable under the Texas statute and the orders of the

Sec. 6-aa, Article 911b, Texas Revised Civil Statutes, is as follows:

"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

Railroad Commission[3] to a common carrier performing similar services was illegal and void.

Although Mr. Christopher advised General Mills on April 11, 1941, that he did not believe there would be any element of violation of law involved if subsequently some additional contract was entered into in adjusting the rates, based on experience and service rendered, and added, "it is simply a reasonable business risk, if it is a risk, which you can afford to take," there is no intimation or suggestion in the record of any purpose at that time to entrap the Defendant into the situation into which Plaintiff now seeks to cast it.

The Defendant contended, in defense, that under Section 6-aa of Article 911b of the Texas Revised Civil Statutes the Railroad Commission had the right only to fix the minimum rates for contract carriers which were in competition with common carriers and which were performing substantially the same service, and that it was not performing such service, nor in such competition; that although the Railroad Commission had provided by general order that the rates charged by contract carriers should not be less than the minimum rates charged by common carriers, nevertheless, such rate could be made applicable only upon a specific finding by the Railroad Commission that the particular contract carrier was in competition with, and performing substantially the same service as, a common carrier; that under Section 6-aa of Article 911b, *supra*, the Railroad Commission was not authorized by the

[3] General Order No. 5, Texas Railroad Commission, provides that: "The rates, rules, and regulations in this tariff, or as may be amended, shall be observed * * * (B) by contract motor carriers as a minimum, on Texas intrastate traffic, unless permits issued by the Commission provide to the contrary."

statutes of Texas to prescribe minimum rates for contract carriers who were not performing substantially similar services to, and who were not in competition with, common carriers; that if Section 6-aa of Article 911b, *supra*, undertakes to delegate such authority to prescribe the minimum rate for all contract carriers whether engaged in competition with common carriers or not, it would be unconstitutional; that the Railroad Commission is a body having a limited jurisdiction under the statute and that any order made within the scope of such statute must affirmatively show that the jurisdictional requisites were present, and in the absence thereof, if the order of the Railroad Commission was intended to apply to the contract operations of the Appellee, then it is void on its face; that the special findings of the jury in the present case that the Appellee was not engaged in rendering substantially similar services to those of a common carrier, and its finding that the Appellee was not engaged in competition with any common carrier, which special verdicts were never set aside, rendered it necessary for the Court to have entered judgment in favor of the Appellant in the light of the asserted insufficiency of Section 6-aa of Article 911b, *supra*, to confer power upon the Railroad Commission to fix rates for a contract carrier not in such competition nor in the rendition of substantially similar services; that as a matter of fact the operations of Appellee were not similar to, nor in competition with, any common carrier; that the Railroad Commission made findings of fact which expressly and impliedly negatived the existence of competition between Plaintiff and common carriers in the services author-

ized to be performed by the permit; that if the contract between Appellant and Appellee was in violation of the Texas Statute as contended, then the parties are in *pari delicto* and the Court should leave them where it found them; that there has been a full settlement and an account stated between the parties; that the Appellee is estopped from maintaining this suit; that the statute of limitations has run against any part of the claim accruing more than two years prior to the institution of the suit.

The jury made negative answers to both of the following special issues submitted to it:

> "First: Do you find from a preponderance of the evidence in this case that the operations of plaintiff Steele under his contract with defendant, were in competition with common carriers over the highways of Texas?
>
> "Second: Do you find from the evidence in this case that plaintiff Steele rendered substantially the same service as that rendered by common carriers, during the time and in the area of transportation herein involved?"

Nevertheless, the Court thereafter peremptorily instructed the jury to find for the Plaintiff, and a judgment for Plaintiff in the sum of $37,884.82 was entered against Defendant.

We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially sim-

ilar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him.

Appellee sued on the statute and the writing that was prepared for presentation to the Railroad Commission, with Mr. Morgan's paragraph 13 therein, which provided for payment to Appellee according to rates and rules of the Railroad Commission, but the evidence is without dispute that paragraph 13 of this alleged contract was never intended by the parties to be a part of the real contract, and was never the basis of payment during the three years of the service. It also is without serious doubt that the substituted paragraph 13, suggested and drawn by Plaintiff's counsel, and setting forth the provision that the applicant would charge the rates fixed by the Commission, was clearly a subterfuge, adopted in order to get by the Railroad Commission, for it was definitely understood that after the permit was obtained this provision would be eliminated and the provision which the Appellee now says was illegal, to-wit, the provision to pay his expenses, plus ten per cent, would be put back into the contract.

Nevertheless, the writing of August 26, 1940, is sued on here without mention of the amendment of July 31, 1941, reinstating the original and real agreement of the parties as to the compensation to Steele.

There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.

Appellee says that this provision in the supplemental contract for the payment of Steele is void, and he ignores the fact that it is a part and parcel of the only contract on which he can declare. A contract modified before there was any performance takes the place of the original one, and consists of the new terms and any provisions of the original contract which the parties agree shall remain unchanged. Steele performed and was paid under the modified contract and a party cannot take the benefits of the modifying stipulations and at the same time repudiate their burdens. See 10 Tex. Jur., §207, page 365.

We think with Appellee that the so-called supplemental contract was void, but we also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties; but that even if it had been *bona fide* and genuine when the instrument was amended prior to any performance, such amendment eliminated the spurious paragraph 13 and became as much a part of the contract as did any other paragraph thereof, and whatever there is of illegality in the method of payment is a part and parcel of the only contract between the parties. The provision for payment under rates and rules of the Railroad Commission so taken out and discarded never was intended to be, and, there-

fore, never was, in fact or in law, the agreement of the parties.

Moreover, when General Mills and Steele agreed to the insertion of paragraph 13, as suggested and drawn by Mr. Morgan, for the sole purpose of getting by the Railroad Commission, well knowing that such a provision was not to be a permanent part of the contract and that it was not expected to be retained or complied with, they committed a fraud upon the lawfully constituted officials of the State of Texas, viz., the Railroad Commission. The conclusion seems inescapable that both parties knew full well that this was a subterfuge, and that neither had any idea of paying the rates provided for in that instrument, and that their participation in the execution thereof with the intent to use it only as a "front" for getting a permit for Steele was an act contrary to good morals and that tended to injustice and to interfere with the purity of the administration of the law such as puts both parties in *pari delicto* with no right to seek advantage or recovery out of paragraph 13, the spurious portion of the instrument.

These views are in no wise in conflict with the holdings of this Court in the case of *Bowen Motor Coaches vs. New York Casualty Company*, 139 F. 2d 332, but in conformity therewith, for in that case we held that under the facts "there was no corrupt agreement to violate the law, no crime was to be committed. The parties were trying to act in accordance with the statute." The inference is that if there had been a corrupt agreement to violate the law, or if the parties had been trying to violate the statute instead of acting

in accordance with it, the doctrine of *pari delicto* would have been applied.

In *Battles vs. Braniff Airways*, 146 F. 2d 336, we did not expressly say so, but impliedly we agreed with the Appellant's contention that since he was a receiver representing not merely the company but its creditors, he would not be adjudged in *pari delicto*.

There should be a distinction between a receiver suing in behalf of creditors and a plaintiff who is *particeps criminis* suing under the very statute that he so glibly violated.

Plaintiff, however, was not content to stand solely upon his alleged contract. He also claims a right of recovery because of the statutes of the State of Texas and the regulations and orders of its Railroad Commission. In other words, he asserts that he is entitled to recover under the contract sued on, and that he is also entitled to recover under the statute of Texas which provides that a contract carrier shall charge, and the shipper shall pay, the rates prescribed by the Commission, which cannot be less than the minimum rates charged by a common carrier performing similar services. Having definitely concluded that he has no right of recovery under paragraph 13 of the contract sued on, we next inquire whether or not the Plaintiff can sustain his claimed right to recover under the statute.[4] The pertinent statutes of Texas make it illegal for a contract carrier to charge other than the rates prescribed and fixed by the Commission, and the failure to comply with the law, or with the lawful regulations

[4] Art. 1690b, Texas Penal Code, Pars. (b), (c), (g), (h), and (i).

and orders of the Commission, is a misdemeanor punishable by fine. The violator is also subject to a penalty recoverable by the State at the suit of its Attorney General or the District, or County, Attorney. No Texas statute expressly declares that a contract contrary to the statutes or regulations shall be void, nor do any of them contain an express provision authorizing a suit by anyone—other than the Attorney General, the District, or County, Attorney, in a suit on behalf of the State of Texas to recover the penalty of $100.00 per day for each day's violation—such as is found in the Fair Labor Standards Act, the Anti Trust Act, or the Price Control Act. There is no ruling here of the Interstate Commerce Commission or other governmental agency that requires the carrier to sue to recover under-charges such as Interstate Commerce Commission Conf. Ruling #314, Bulletin 7, saying in part:

> "It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor."

It will be assumed, however, that any contract, the execution of which is a criminal offense, is illegal and unenforceable. It may also be true that even though there is no provision in the statute authorizing a person to bring suit under it, nevertheless, he may do so if he has been specially injured and if it clearly appears that the statute was enacted for his protection or benefit,[5] and if

[5] "An action for the violation of a statutory duty is generally maintainable by any person injured thereby, who suffers a special damage therefrom, and who is of a class entitled to take advantage of the law. Within the meaning of this rule, persons entitled to take advantage of the law are members of the class intended to be protected by the statute, or for the benefit of whom the statute was en-

he by his own participation in some illegal arrangement has not barred his right to relief through the processes of the Court.

The statute here does not expressly authorize a suit for the recovery of the prescribed rates by anyone and

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acted. Indeed, even though the violation of a statute is regarded as actionable, it is generally required that the injury be done to one of the class designed to be protected by the statute, or for whose benefit the statute was enacted, and to whom a duty of compliance with the statute is owed. It has also been stated as general rules that a statutory right of action may be maintained only for the benefit of the persons specified in the statute, and that where a right is given by statute, only those to whom the right is in terms given may avail themselves of its benefits." 50 Am. Jur., §587, page 582.

In *Norwood vs. Galveston, H. & S. A. Ry. Co.*, 34 S. W. 180, the Texas Court of Civil Appeals, citing and quoting Blackstone, said:

"The law gives no private remedy for anything but a private wrong."

"Where a statute prohibits the doing of a particular action affecting the public no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the part of the complainant to allege and prove that the doing of the act prohibited has caused him some special damage, some particular injury, beyond that which he may be supposed to have sustained in common with the rest of the queen's subjects by an infringement of the law."

In *Texas & N. O. R. Co. vs. Brotherhood of Ry. Steamship Clerks*, 33 F. 2d 13, we said:

"The violation of a duty created by statute, resulting in damage to one of a class for whose benefit the duty was imposed, confers a right of action upon the injured person, though the statute makes no provision as to a remedy for such wrong. Marbury vs. Madison, 1 Cranch. 137, 163, 2 L. Ed. 60; DeLima vs. Bidwell, 182 U. S. 1, 176, 21 S. Ct. 743, 45 L. Ed. 1041; 1 Corpus Juris 951."

* * * *

"A statutory right of action exists only in favor of those for whose benefit the duty is imposed, and Plaintiff must show not only a violation of the statute, but that the inquiry complained of was occasioned thereby." 1 C. J. 952, §47.

* * * *

"* * * The true rule is that the question depends upon the intention of the legislature as construed from the provisions of the particular statute; and if it appears that the duty imposed is merely for the benefit of the public, and the fine or penalty a means of enforcing the duty and punishing a breach thereof, the fine or penalty is exclusive, and a private action cannot be maintained for injury sustained by reason of the breach. If, on the other hand, it appears that the duty imposed is also for the benefit of particular individuals or classes of individuals, a private right of action arises for injury sustained by reason of the breach, by any person the statute was designed to protect, provided the injury sustained by him is a special injury different from that inflicted on the general public, and has resulted proximately from and because of the violation; * * *" 1 C. J. S. §12, page 996.

we should not hold it to be the law that one has a statutory cause of action under a statute which he has intentionally violated and disregarded unless there is express language, or a clear intent on the part of the Legislature, that the particular statute was enacted for his benefit and protection.

In the instant case the statute was not for the benefit of contract carriers but for the benefit of common carriers.

The Plaintiff here can show no special damage. He received a clear profit of ten per cent out of every truckload that he hauled. Moreover, he cannot claim special damages to himself which he himself caused by his own conduct and contract.

In 1 Tex. Jur. §18, page 625, appears this statement:

> "In general the law affords to private persons a remedy for private wrongs only. So where a statute prohibits the doing of a particular act affecting the public, the mere commission of the prohibited act confers no personal or private right of action."

A statute that is passed for the protection of the general public against negligence can be the basis of a suit for a recovery by anyone specially injured as a result of failure to observe such statute, similarly as one may recover under a contract entered into by third parties for his benefit, such as a contract between the City and a water company to supply water with which to fight fire, but the provision in the statute here to require a contract carrier, who is in competition with

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Mugge vs. Tampa Water Works Company, 53 Fla. 371, 42 So. 81.

common carriers rendering substantially similar service to charge not less than such common carrier was to protect the common carrier from indiscriminate and disastrous competition. It will be noted here that the statutory requirement was not that the contract carrier should not charge *more* than a common carrier, but that it should not charge *less* than such common carrier. It was not a regulation for the benefit of the citizens generally in an endeavor to secure cheaper transportation, nor was it for the purpose of benefitting one who purposefully violated it.[7] Moreover, a contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He has no other customer in whose favor he could discriminate. The statutes against discrimination by a contract carrier having only one customer were never intended for the benefit or protection of either the contract carrier or his customer, but were intended only to prevent a contract carrier who is in competition with a common carrier in the performance of similar services from underselling the common carrier. The present suit is not a suit by a common carrier; it is not a suit for penalties by the Attorney General; but it is a suit by one who violated the statute for three years, and until the end of his contract, meanwhile being protected from any hazard of financial loss by receiving all expenses back, plus a profit of ten per cent, and who,

[7] "Appellant presents several propositions, but we deem it unnecessary to discuss them, because the law is well settled that no legal right arises out of an unlawful act; and no action can be maintained upon a claim arising out of or based upon an illegal act, if plaintiff must rely in any way upon the illegal transaction to make out or establish his case. Dufek v. Harrison County (Tex. Civ. App.) 289 S. W. 741; 1 Tex. Jurisprudence, 621; 1 C. J. 957; 1 R. C. L. 317; and numerous cases there cited and discussed." *Heard vs. Denman*, 29 S. W. 2d 824.

when such profit ceased to flow, then decided that the statute ought to be enforced—but only as against his contractee.

Surely a Daniel has come to judgment and from what a remarkable source!

The statute was not enacted for his protection, and we are of the opinion that the Plaintiff has no right of action either under the contract or under the statute.

The judgment should have been for the Defendant and the cause is reversed with directions to enter such judgment.

REVERSED.

HUTCHESON, Circuit Judge, Dissenting:

I deprecate as much as my associates do the fact that appellant, a trusted employee of appellee and well represented by counsel, has welshed on his agreement, deliberately and thoughtfully entered into on advice of counsel, and in the name of the law is profiting thereby. But I cannot agree that appellee may in law be allowed to have the service performed without paying the statutory rate it agreed, and the law compelled it to pay. I think it clear that the district judge was right in the view he took, that the authorities in Texas leave in no doubt that rates prescribed by the Texas Railroad Commission are the only proper rates which may be charged and that a cause of action arises out of the statute in favor of any person who performs the services for which the rates are prescribed. The Railroad Commission's general order of 1931, therefore, prescribing common carrier rates as minimum rates

was applicable to Steele's permit and was valid and enforceable. The supplemental contract for a less rate which was never approved by the Commission was not a valid contract of carriage, and though the parties acted, and payments were made, under it, this constitutes no defense to an action for the statutory rate. *Herrin v. Marmion*, 113 SW (2d) 291; *Pittsburgh v. Fink*, 250 U. S. 577. On the authority of Texas cases which apply the same doctrine to insurance rates that they do to carrier rates, we held in *Bowen Motor Coaches v. N. Y. Casualty Co.*, 139 F. (2d) 332, that no contract could change the statutory rates and that they must be collected. To the suggestion made there that because the parties were in *pari delicto* in making an unlawful contract, plaintiff could not recover, we said, "There was here no corrupt agreement to violate the law. No crime was to be committed." In *Battles v. Braniff*, 146 F. (2) 338, we held that no matter how illegal an agreement, to pay a less premium than the statute was, or how illegally it was entered into, it would be ineffective to prevent recovery in a suit on the policy for the premiums the law fixed as due.

I cannot, therefore, agree with the view of my associates, that the appellee should be permitted to have its freight hauled for a less charge than others were under the law compelled to pay, and appellant, because in *pari delicto* with appellee, may not recover. In the first place, I do not agree that the evidence supports the view the majority opinion expresses that the parties entered into their arrangements with the deliberate purpose of defeating the law. Their letters and their conduct, I think, show beyond question that they

thought they were not evading but complying with the law. From the letters of Christopher and the attorneys for General Mills no other view may be gathered than that they thought that the services to be performed by Steele would not be similar services to those performed by common carriers, and the Commission's 1931 general order, making common carrier rates minimum for contract carriers performing similar services did not therefore apply. I am of the opinion, therefore, that when the agreement was made, they did not intend to commit a crime, that is, to violate the law and subject themselves to a penalty of $200.00 a day each. If this is the correct view of the facts, and I think it is, then clearly the *pari delicto* doctrine does not apply. *Bowen v. N. Y. Casualty Co., supra.*

But if I could agree that there was a deliberate intent to defraud the statute, I still could not agree with the majority, whether plaintiff's suit is to be regarded as on the written contract which was exhibited to and filed with the Commission, or on the right arising out of the statute to recover the legal charges for the services rendered, for the right to recover the legal charges and no other rests on an overriding public policy. This policy is so imperative that it may not be defeated by the conduct of the parties in entering into legal and evasive arrangements which it is the very purpose of the policy to strike down. It remains to consider only whether the suit was on the contract signed by the parties and exhibited to the Commission as a basis for the permit, and, therefore, the defense of limitation is unavailable, or was on the statutory obligation arising from the performance of the service, and, therefore,

limitation has barred a part of the recovery. It seems clear to me that plaintiff's suit is on the contract, which the parties made and exhibited to the Commission, and in which they agreed to pay the legal rates, and that the case is ruled by *Central Freight Lines v. C & S Motor Freight Lines*, 125 SW 615. There the court held ineffective a private agreement which, as here, was not submitted to the Commission. I think the judgment should be affirmed, and I respectfully dissent from its reversal.

A True copy:

Teste:

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Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

APPENDIX "A-1"

In The
UNITED STATES CIRCUIT COURT OF APPEALS
For the Fifth Circuit

No. 11313

GENERAL MILLS, INC., Appellant,
versus
LEO H. STEELE, Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

(February 15, 1946.)

ON PETITION FOR REHEARING

Before WALLER and LEE,
Circuit Judges.

PER CURIAM: We are indebted to the Attorney General of the State of Texas for his able brief as *amicus curiae* on the petition for rehearing.

The suit here was not one to enforce, to rescind, nor to enjoin an executory or uncompleted contract. It was a suit by one party, in *particeps criminis*, against another in like situation, under a fully completed contract, wherein it was sought to penalize one party to the extent of $37,000.00 and to reward the prime of-

fender in like amount. We refer to the Appellee as the "prime offender" for the reason that it was he, who got the permit from the Railroad Commission of the State of Texas, who used the highways of the State, and who engaged in the business of contract transportation which the Texas law sought to regulate. Although we do not undertake to measure the degree of *delictum*, it certainly cannot be insisted that the shipper had a greater responsibility to the public than the certificate holder, or truck operator. The statutes of Texas allow recovery of a penalty against both parties at the suit of the Attorney General, which penalty would go to the State of Texas, and not to a violator of the law. We have been cited no case in Texas that compels the conclusion that where the Court finds both parties in *pari delicto* under a *contract that has been fully executed* it should lend its aid to one in preference to the other. The law of Texas is to the contrary. See *Wright vs. Wight & Wight*, 229 S. W. 881.

In 10 Tex. Jur., page 242, §140, there is this statement:

> **"Recovery of Money or Property Parted With.**— Where an illegal contract has been fully executed, the courts will not interfere to litigate the claims of parties *in pari delicto* who have been injured thereby; neither a court of law nor a court of equity will aid either party to recover or reinvest himself with any title or interest vested in the other, but will leave them in the same position as to vested interests as they, by their own acts, have placed themselves. So money paid under an illegal contract may not be recovered back, where

the contract has been fully executed and the parties are *in pari delicto*."

See also 12 Amer. Jur. page 725 §213.

This is also the law as announced in Federal courts. In *Spring Company vs. Knowlton*, 103 U. S. 49, the Supreme Court cited recognized texts on contracts in support of the same rule announced in *Wright vs. Wight & Wight, supra*, and also quoted the following statement from one of those texts on contracts:

> "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are in pari delicto neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of in debitatus assumpsit for money had and received."

The petition for rehearing is

DENIED.

A True copy:

.....

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

APPENDIX "B"

VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS ANNOTATED

Art. 911b. Motor Carriers and regulation by Railroad Commission—Definitions

Sec. 1. When used in this Act unless expressly stated otherwise:

(a) The term "person" means and includes an individual, a firm, co-partnership, corporation, company, an association or a joint stock association.

(b) The term "Commission" means the Railroad Commission of the State of Texas.

(c) The term "Highway Commission" means the Board of Highway Commissioners of the State of Texas.

(d) The term "public highway" means every street, road or highway in this State.

(e) The term "certificate" means certificate of public convenience and necessity issued under this Act.

(f) The term "permit" means the permit issued to contract carriers under the terms of this Act.

(g) The term "motor carrier" means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over

any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term "motor carrier" as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns.

(h) The term "contract carrier" means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 1.

Certificate of Convenience and Necessity

Sec. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation. No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 3.

Supervision and Regulation by Commission

Sec. 4. (a) The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property

for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, to prescribe all rules and regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly, annual or other reports and other data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 4.

(c) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the shipping public that may be necessary in the interest of the public.

(d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the high-

ways by motor carriers, adjusting and administering its regulations in the interests of the public.

The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the Commissioners' Courts of the several Counties and to the recommendations of the local government of any municipality through or between which motor carriers operate. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 4.

Application for permits; special permits

Sec. 6. (a) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract car-

rier. The Commission shall have the power to suspend for ten (10) days any existing permit after notice and hearing and to revoke any existing permit when it appears that such permit holder has disobeyed or violated any provision of this Act or of General Laws regulating motor vehicles or violated any rule or regulation of the Commission authorized by this Act.

(b) No application for a permit shall be considered by the Commission unless it be reduced to writing and set forth the following facts:

(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

(2) The application shall set forth the nature of the transportation in which the applicant wishes to engage, stating substantially the territory to be covered by the operation and including the condition and character of the roads over which the transportation is to be performed.

(3) It shall give a description of each vehicle which the applicant intends to use, including weight and size of vehicle and its carrying capacity.

Rules and regulations for contract carriers

Sec. 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Com-

mission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 6.

Permits not granted as contract carrier to person operating as common carrier

Sec. 6bb. No application for permit to operate as a contract carrier shall be granted by the Commission to any person operating as a common carrier and holding a certificate of convenience and necessity, nor shall any application for certificate of convenience and necessity be granted by the Commission to any person operating as a contract carrier nor shall any vehicle be operated by any motor carrier with both a permit and a certificate. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 6.

Hearing at Austin; notice to existing owners and to Highway Commission

Sec. 11. Upon the filing of said application for a certificate or permit, the Commission shall fix a time and place for hearing, and the place of hearing shall be in the City of Austin, Texas, unless otherwise ordered by the Commission. Notice of the filing of said application, and the time and place of hearing, shall be given by mail not less than ten (10) days, exclusive of the day of mailing before such hearing, addressed to the owner or owners of existing transportation facilities serving such territory as applicant seeks to serve, as well as to the Highway Commission of the

State of Texas, the County Judge or Judges of the Counties and to the mayor of any incorporated city or town through which such carrier seeks to operate. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 11.

Review of decisions of Commission by district court of Travis County; appeals

Sec. 20. If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause and said appeal shall be at once returnable to said Appellate Court having jurisdiction of said cause and said action so appealed shall have precedence in said Appellate Court over all causes of a different character therein pending; provided, that if the court be in session at the time such right of action accrues the suit may be filed during such term and stand ready for trial after ten days' notice. In all trials under this section the burden of proof shall rest upon plaintiff, who must show by the preponderance of evidence

that the decisions, rates, regulations, rules, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them. The Commission shall not be required to give any appeal bond in any cause arising hereunder and no injunction shall be granted against any order of the Commission without hearing unless it shall clearly appear that irreparable injury will be done the complaining party if the injunction is not granted.

General policy

Sec. 22b. Declaration of Policy. The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 21.

APPENDIX "C"

State of Texas

Railroad Commission of Texas,
Austin.

Commissioners: C .V. Terrell, Chairman, Lon A. Smith, Pat M. Neff, C. F. Petet, Secretary.

General Order No. 25.

Austin, Texas, August 22, 1931.

Whereas, Chapter 314, of the General Laws of the State of Texas, passed by the Forty-first Legislature, Regular Session, as amended by Chapter 24, of the General Laws of the Second Called Session thereof, having been further amended by Chapter 277 of the Acts of the Forty-second Legislature Regular Session, by declaring all persons, firms, co-partnerships, corporations, companies, associations and joint stock associations other than common carriers, engaged in the transportation of property for compensation or hire over the highways of Texas, to be Contract Motor Carriers.

And Whereas, said above mentioned acts imposed upon the Railroad Commission of Texas, the duty to fix, prescribe or approve rates and charges of such Contract Motor Carriers, as well as to fix, prescribe or approve just and reasonable rules and regulations to be observed by such Contract Motor Carriers.

It is, Therefore, Ordered by the Railroad Commission of Texas, that, effective August 22, 1931, all Contract Motor Carriers as hereinbefore defined, be and they are hereby ordered to observe and apply as mini-

mum temporarily and until further orders of this Commission, pursuant to hearing called for Monday, August 31, 1931, under Motor Freight Circular No. 1297, the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Class "A" Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended; Railroad Commission of Texas Motor Freight General Rules Circular No. 1, as amended; and Railroad Commission of Texas Commodity Tariff No. 2, (Cotton and Cotton Linters), as amended.

Penalties.

"If any motor carrier, or any officer, agent, clerk, servant or employee or receiver, or his agents, servants, or employee, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said commission, such contract carrier or any officer, clerk, servant or employee or receiver, his agents, servants or employee, of such contract carrier shall be guilty of misdemeanor and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions

hereof, shall likewise be guilty of a misdemeanor and, upon conviction shall be punished by a fine of not more than two hundred dollars ($200.00) for each offense."

(Section 16 (i) New Motor Carrier Law.)

RAILROAD COMMISSION OF TEXAS,
C. V. TERRELL,
Chairman.
LON A. SMITH,
Commissioner.

Attest:

C. R. McNAMEE,
(Seal) Acting Secretary.

APPENDIX "C-1"

Motor Freight Class and Commodity Tariff No. 1-A

Effective 7-26-40.

Seventh Revised Page 15 (Cancels 16th Revised Page 15).

Section No. 3.

General Application of Rates.

Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed:

(A) By Common Carrier Motor Carriers on Texas Interstate Traffic. (See Exception.)

Exception: The rates, ratings, rules and regulations provided herein will not apply between Beaumont and Port Arthur on Traffic transported by F. N. Ragsdale for the account of Railway Express Agency, Incorporated.

(B) By contract carrier motor carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary.

(Cir. 1001, General Order 25 and Cirs. 1514, 2073 and 2198.)

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 79

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 79

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

BRIEF FOR PETITIONER

May It Please The Court:

CITATION OF OPINION BELOW

The opinion of the Circuit Court of Appeals, Fifth Circuit is reported in Vol. 154 Fed. (2nd) page 367.

GROUNDS OF JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. Sec. 347) and under Supreme Court Rule No. 38, Sec. 5.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed January 8, 1946; petition for rehearing was filed January 28, 1946; opinion on rehearing was filed February 15, 1946, and decree entered February 15, 1946. Application for stay of mandate, pending application in this Court for Writ

of Certiorari, was filed February 19, 1946, and order staying the mandate for sixty days, pending the application for Writ of Certiorari in this Court, was entered February 21, 1946—Petition for Certiorari was granted by this Court on May 27, 1946. (R. 346.)

PRELIMINARY STATEMENT

The trial court decided every issue in this case favorable to the petitioner and adversely to the respondent. (R. 87, 88, 104.) The respondent appealed to the Fifth Circuit Court of Appeals, which court likewise decided every issue favorable to the petitioner and adversely to the respondent, except the one issue of pari delicto and reversed the case on this point. (R-print 303-320.)

This brief will be divided into two sections. Section One will deal with the subject of pari delicto in rate cases. This was the one issue decided by the Circuit Court of Appeals and it is the controlling point in this case. There is nothing else before the court.

The respondent filed a brief in reply to the petitioner's Application for a Writ of Certiorari in which it attempted to raise immaterial issues. In Section Two of this brief we shall attempt to cite the authorities that make the position of the respondent untenable, even on such immaterial issues.

NATURE OF THE CASE

In 1931 the Legislature enacted Article 911b, Section 1 to 22b inclusive, Vernon's Annotated Civil Statutes, relating to all motor carrier operations over the highways by truck, and authorized the Texas Railroad Commission to fix the rates and regulate all carriers for hire.

Immediately after the Legislature enacted the law, the Commission established rates for contract carriers (R. 133, 134, 135), with an amendment thereto in 1940. (R. 136-137.) Petitioner is a resident citizen of Texas. The respondent is a Delaware corporation with a permit to do business in Texas. (R. 139.) Diversity of citizenship is the basis of jurisdiction in the Federal Court. On the 26th of August 1940 petitioner (who will hereinafter be referred to as carrier) entered into a written contract with respondent (who will hereinafter be referred to as shipper) by the terms of which the carrier agreed to transport, and the shipper agreed to ship, certain commodities from its flour mill in Wichita Falls, Texas, to various cities and towns within the State of Texas. By the terms of said contract, it was agreed that the carrier would charge and the shipper would pay the rates therefor as fixed by the Railroad Commission of Texas. (R. 116-122 inclusive.) Pursuant to the regulations of the Commission, the carrier filed an application with the Commission August 26, 1940, seeking authority to operate over Texas highways as a contract carrier for hire on behalf of the shipper to haul its commodities from its mill in Wichita Falls. This application was in writing

on the forms as provided by the Commission, and in response to one of the requirements of the Commission, it was provided "applicant proposes that the tariff to be charged for the services proposed to be rendered will be that as promulgated by the Railroad Commission of Texas." (R. 67-75.)

Pursuant to the rules of the Commission, notice was given and public hearings were held, at which hearings the carrier appeared in person, and the shipper, through its traffic manager, Mr. McCraney, appeared and testified under oath before the Commission concerning the proposed operation. (R. 143.) On June 16, 1941, the Commission entered its order granting in part and denyng in part the contract carrier application. (R. 124-129.) In this order the Commission found:

> "The Commission, after carefully considering the evidence, the laws and its own rules and reguiations, is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier; * * * In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers." (R. 127.)

See rate orders of the Commission. (R. 133-136.) The Commission entered its order authorizing the operation June 16, 1941 (R. 124), and then the Commission issued the Permit July 9, 1941 (R. 130). Subsequent thereto, namely July 31, 1941, the carrier and the shipper entered into a second contract (R. 208), which

provided that the shipper would pay, and the carrier would collect, a rate less than the one prescribed by the Commission.

The freight charges were collected in accordance with the terms of the second contract. This suit is one for the undercharge in rates; that is, the difference between the amount actually collected, and the amount due according to the rate fixed by the Commission.

The trial court gave an instructed verdict for the plaintiff (carrier) (R. 87), and, pursuant to such instruction, the jury returned a verdict for the carrier. (R. 87.) The court then entered its final judgment on December 27, 1944, in favor of the carrier in the sum of $37,884.82, together with six per cent interest (R. 104-7), which represented the difference in the amount collected under the second contract, and the amount that would have been collected according to the terms of the first contract, and pursuant to the rate orders of the Railroad Commission. Said total included the transportation tax. The trial judge also entered Findings of Fact and Conclusions of Law. (R. 88 to 99 inclusive.)

The opinion in the Circuit Court was divided two to one with Judge Joseph C. Hutcheson, Jr., of Texas dissenting on the grounds that the rule of pari delicto could not apply to this freight rate under-charge case because of the overriding public policy.

SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals erred in holding that a Delaware Corporation could enter Texas and have its commodities transported over the Texas highways and evade the payment of the freight rates therefor as fixed by the Railroad Commission, by the simple device of entering into a second contract with the carrier for a lower rate, after the Commission had issued a permit and fixed the rate.

2. The Circuit Court of Appeals erred in not applying the standards of rates, as fixed by the Texas Legislature, and by the Railroad Commission, for contract carriers operating on Texas highways, when said court refused to allow a carrier to collect said legal rate, and, in effect, allowed a shipper to escape the payment of the legal rate simply because the shipper and the carrier entered into a second contract for a lesser rate.

3. The Circuit Court of Appeals erred in holding that a carrier could incapacitate or estop himself from collecting the freight rates as fixed by the Railroad Commission by entering into a second contract with the shipper for a lesser rate.

4. The Circuit Court of Appeals erred in holding that the public policy of Texas was contrary to the announced public policy as declared by the Legislature, the State courts, the Attorney General and the Federal District Court sitting in Texas.

5. The Circuit Court of Appeals erred in holding that a carrier was estopped from collecting the legal freight

rate fixed by the Railroad Commission, because the carrier had entered into a second contract for a lesser rate, since the carrier did not rely upon nor seek the aid of the second contract.

6. The Circuit Court of Appeals erred in holding that the public interest in freight rates did not override the pari delicto rule.

7. The Circuit Court of Appeals erred in holding that a carrier did not have a right and a duty to collect from a shipper the rate as fixed by the Railroad Commission for the transportation of the shipper's commodities over Texas highways.

8. The Circuit Court of Appeals erred in deciding this case upon facts and issues not considered by the the trial court.

SECTION ONE

(Relating to the Pari Delicto Rule)

ARGUMENT AND AUTHORITIES

There is no controversy between the parties as concerns the facts: the carrier actually transported 424,919,582 pounds of freight for the shipper over Texas highways by truck during the period involved; the carrier was paid $44,803.33 for such transportation services. Applying the rate fixed by the Commission and the rate agreed upon in the first contract, the amount would have been $77,814.98, including transportation tax. The operation was by virtue of a permit issued by the Railroad Commission. (R. 130.) The original contract between the parties provided:

> "It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." (R. 120-121.)

This contract was exhibited to the Commission pursuant to its rules and was offered in support of the application for the Permit. (R. 243-4.) The application for the Permit addressed to the Commission provided in part:

> "Applicant proposes that the tariff to be charged for the service proposed to be rendered will be that as promulgated by the Railroad Commission of Texas." (R. 70.)

The Permit as issued by the Commission contained the following provision:

> "This permit to remain in effect from and after the date hereof, subject to the provisions of Chapter 277, Acts Regular Session of the Forty-second Legislature, 1931; the further orders of the Commission; and the Rules and Regulations of the Railroad Commission of Texas, *heretofore prescribed or which may be hereafter prescribed* under and pursuant to authority conferred upon it by law." (R. 130-132.)

The orders of the Commission relating to rates is

the largest body of Commission regulations pertaining to carriers and perhaps the most important.

One of these important orders is contained in Item 470 of Class and Commodity Tariff No. 1-A as follows:

> "Section No. 3. General Application of Rates. Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed: * * * (B) By contract carriers as minimum, on Texas Intrastate Traffic, etc." (R. 136-137.)

The Commission's reference to rate requirements under the permit as found in Commission order granting the permit is quoted at page 4 of this Brief.

Subsequent to the granting of the Permit by the Commission, the carrier and the shipper entered into a second contract which provided for a rate less than the one fixed by the Commission. (R. 208.) This second contract was never submitted to, nor approved by, the Commission. (R. 245.) In this case the carrier sued for the difference between the amount he collected under the second contract, and the rate fixed in the first contract and the tariff rate fixed by the Commission.

TWO QUESTIONS OF LAW CONTROL

There are two controlling and related questions of law in this case; (1) Is petitioner (the carrier) estopped or incapacitated from prosecuting this suit against the respondent (shipper) to collect the tariff rates legally fixed by the Commission, solely because he en-

tered into a second contract to charge and did charge and collect from respondent, a lesser rate?; (2) Since petitioner did not sue upon, nor seek nor require any aid from the second contract, which provided for a rate less than the rate legally fixed by the Commission, but made out his case without reference to this second contract, is he thereby prevented or estopped from recovering the legal rate, even though he be in pari delicto?

The majority opinion of the Circuit Court of Appeals decided both questions adversely to the petitioner, with Justice Hutcheson dissenting. The judgment of the Circuit Court is contrary to, and directly in conflict with, the enactments of the Texas Legislature, the decisions of the State courts, the opinion of the Attorney General, and the decision of the trial court sitting in Texas.

THE DOCTRINE OF PARI DELICTO CANNOT BE APPLIED TO A RATE CASE

In Texas the Railroad Commission fixes the rates for all carriers. Article 911b, Sec. 4 (a) reads:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, * * * and to supervise and regulate motor carriers in all matters

affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not."

"4 (c) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the shipping public that may be necessary in the interest of the public.

"4 (d) * * * and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adusting and administering . s regulations in the interests of the public.

"6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.

"Sec. 20. If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a dif-

ferent nature and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause and said appeal shall be at once returnable to said Appellate Court having jurisdiction of said cause and said action so appealed shall have precedence in said Appellate Court over all causes of a different character therein pending; provided, that if the court be in session at the time such right of action accrues the suit may be filed during such term and stand ready for trial after ten days' notice. In all trials under this section the burden of proof shall rest upon plaintiff, who must show by the preponderance of evidence that the decisions, rates, regulations, rules, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them. The Commission shall not be required to give any appeal bond in any cause arising hereunder and no injunction shall be granted against any order of the Commission without hearing unless it shall clearly appear that irreparable injury will be done the complaining party if the injunction is not granted.

"Sec. 22b. Declaration of Policy. The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such high-

> ways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may service the best interest of the general public. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 21."

Article 6448 relates to railroads.

Thus the Statutes of Texas vest exclusive authority in the Railroad Commission to prescribe rates. A different rule to this prevails with the Interstate Commerce Commission, which merely requires that the carrier file and publish its rates, which become the lawfully published rates unless suspended or cancelled by affirmative action of the Interstate Commerce Commission. *Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co.*, 51 SWR (2nd) 284.

The Supreme Court of Texas in the early case of *Railroad Commission v. Weld & Neville*, 73 SWR 529, announced the rule as follows:

> "The Railroad Commission Law deprived railroad companies of the power to make rates, and conferred that authority upon the commission, * * *."

In the case of *Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas*, 3 SWR (2nd) 489, affirmed in 13 SWR (2nd) 679, the Court held:

> "In the State Act, * * * the rate making power is taken away from the carriers altogether, and vested exclusively in the Commission, * * *."

A more recent case is that of *Railroad Commission v. Uvalde Construction Co.*, 49 SWR (2nd) 1113-4, wherein the court said:

> "Here the Railroad Commission itself fixes the rates, and that rate is conclusively presumed to be reasonable, just, and not discriminatory, until declared otherwise by a court of competent jurisdiction."

In the case of *West Texas Compress & W. Co. v. Panhandle & S. F. Ry. Co.*, 15 SWR (2nd) 558, the court said:

> "Since the commission is an instrumentality of the state, exercising delegated powers, its orders are of the same force as would be a like enactment of the Legislature."

Likewise, all rate orders promulgated by the Commission are written into and become a part of every contract of shipment that is made. Such was the holding in the case of *Texas C. Ry. Co. v. Kerns*, 108 SWR 187, wherein the court said:

> "In every contract of shipment in this state the law writes the particular rate fixed and authorized by the Railroad Commission of Texas."

THE CARRIER HAS A PUBLIC DUTY TO COLLECT, AND THE SHIPPER TO PAY, THE TARIFF RATES AS FIXED BY THE COMMISSION

In the case of *Texas and New Orleans Railway Company v. East Texas Gravel Company*, 175 SWR (2nd) 435, involving an intrastate shipment the rule was stated as follows:

> "We further recognize that railroad companies are charged with a public duty to collect the full amount of freight charges, according to the rate fixed by the Railroad Commission, and that they cannot by means of estoppel, or by any other device, escape performance of this public duty. Texas & N. O. R. Co. v. Yates, 139 Tex. 89, 161 SWR (2nd) 1050."

Likewise, the Supreme Court of Texas in the case of *Texas & N. O. Ry. Co. v. Yates, et al*, 161 SWR (2nd) 1050, involving intrastate shipments held:

> "The railroad company could not by means of estoppel 'or by any other device' escape the performance of this public duty. * * *
>
> "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in Houston & T. C. R. Co. v. Johnson, Tex. Com. App. 41 SW (2nd) 14, 83 A. L. R. 241."

The Texas Supreme Court in the case of *H. & T. C. R. Company v. Johnson*, 41 SWR (2nd) 14, held:

> "The provisions of the statutes are such as to

> make the collection of those charges a public duty on the part of the carrier, and to incapacitate the carrier to refund or to remit 'in any manner or by any device' any portion of such charges. Johnson was charged with knowledge of these statutory provisions and of their legal affect. He relied at his peril on the representation that the freight charges had been prepaid; for he was charged with knowledge that the carrier could not by that means evade the public duty, imposed by the statutes, to collect the full amount of charges lawfully due."

The law fixing the right and duty of a carrier to collect, and the shipper to pay, the rates prescribed by the Commission, applies both to rail and truck transportation. *Herrin Transportation Co. v. Marmion*, 113 SWR (2nd) 291.

This court has many times passed on the question involved. Reference is here made to the case of *L. & N. Ry. v. Central Iron and Coal Company*, 265 U. S. 59, 68 L. Ed. 900, in which the rule was stated:

> "No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statutes of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

The reasons assigned by all of the courts in refusing to permit a shipper to evade the rates fixed by the

Commission is that such rule will prevent rebates and discrimination.

The respondent on pages 46 and 47 of its brief said:

> "It is also conceded that the purpose of the act under which the permit was granted was * * * to protect common carriers against destructive, unfair and discriminatory competition by other motor carriers in the use of the highways."

This admission that the act, like the railroad rate act, was designed to prevent discrimination, clearly demonstrates that such rates can no more be evaded, wilfully or by inadvertence, than can the railroad rates be so evaded.

See *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553.

There can be no discrimination because every other shipper and every other carrier, operating in Texas, is subject to the same regulations and the same classification of rates for the same commodities to every other member as a class of which such carrier or shipper may belong.

The decision of the Circuit Court in this case is not only in conflict with the Supreme Court of Texas and the Supreme Court of the United States, but also that of other Circuit Courts. The Eighth Circuit Court of Appeals passing on the question involved in the case of *New et al v. Denison Clay Co.*, 260 Fed. 70, held:

> "A carrier is required by law to collect, and the shipper to pay, the tariff rate on interstate shipments. This mutual obligation of carrier and

shipper cannot be affected by mistake, design, or even positive contract to the contrary. It is a liability arising from and fixed by law, exists independent of contract, and attaches to the status of interstate carriage."

To like effect see *Bottemueller v. Wilson & Co.*, 57 Fed. Sup. 766, wherein it was said:

"Quite obviously the suit is one on a hauling or transportation contract. The plaintiff undertook to perform certain services for the defendant for a compensation set out in schedules attached to a written contract. The schedule of charges did not agree with published rates filed by the plaintiff and promulgated by him as an interstate contract carrier by motor. Under such circumstances the published tariffs superseded the agreed rates and entered into and became a part of the contract just as effectively as if written therein."

An interesting case from the State of Massachusetts, which state has a motor carrier statute almost identical with that of Texas, is that of *Papetti v. Alicandro*, 58 NER (2nd) 155, in which case the contract carrier, who later changed to a common carrier, contracted with the shipper to charge a rate as promulgated by the Commission and did charge such rate. After the collection of the rate, by private contract the carrier rebated to the shipper the cash according to the terms of the private contract. After discussing the facts and the law at great lengh the court held:

"Unless the plaintiff is prevented by some rule of law, he is entitled to maintain this action. We

> think that the plaintiff not only is not so barred, but that is is both his right and duty to recover the rebates. * * * 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay.' Kansas City Southern R. Co. v. Carl, 227 U. S. 639. 'The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier'." (Citing many cases.)

The court then proceeded to cite the case of *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 83 L. Ed. 953, in which the Supreme Court of the United States said:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disaprpoval as voluntary rebates."

THE LAWFULLY PRESCRIBED TARIFF RATES CANNOT BE ESCAPED EVEN BY WILFUL DESIGN

The Supreme Court of Texas in *H. & T. C. R. Company v. Johnson*, 41 SWR (2nd) 14, correctly stated the rule as follows:

> "The provisions of the statutes are such as to make the collection of those charges a public duty on the part of the carrier, and to incapacitate the carrier to refund or to remit 'in any manner or by any device' any portion of such charges."

See also *Texas N. O. R. Co. v. Yates, et al*, 161 SWR (2nd) 1050:

> "The railroad company could not by means of estoppel '*or by any other device*' escape the performance of this public duty."

This court passed on the question in the case of *N. Y., New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, where it was held:

> "The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purposes of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all."

For decisions in other jurisdictions reference is made to 83 *A. L. R.*, pages 245 et seq., where the cases are summarized in *Georgia R. Co. v. Greety*, 5 Ga. App. 424, 63 S. E. 528, as follows:

> "'Some of these cases, and among them the Georgia case of Savannah, F. & W. R. Co. v. Bundick (1894), 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S. E. 995, supra, refer to the principle that, where the parties have agreed to violate the laws, the courts will not allow an action as to that matter in favor of either of them; and from this it might seem at first blush that, the shipper and the carrier having contracted for the transportation of the goods at a rate the very charging or accepting of which is a violation of law, the whole contract of transportation would be unlawful, and that the courts would not give aid to a carrier seeking to collect for the transportation charges or any part thereof, where it becomes necessary for the carrier to assume the role of plaintiff. Upon maturer reflections we are of the opinion that this position is untenable.'"

CARRIER SOUGHT NO AID FROM ILLEGAL CONTRACT

We agree with the Circuit Court that the second contract which provided for a rate less than that fixed by the Commission was void. However, the carrier did not sue upon this illegal contract nor was it necessary for him to rely upon it to make out his case. He was clearly within the rule of law announced by the Supreme Court of Texas in *Beer v. Landman*, 88 Tex. 450, as follows:

> "The plaintiff cannot recover when it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover."

Likewise, in the case of *Morrison v. City of Fort Worth*, 155 SWR (2nd) 908, the Supreme Court said:

> "In order to establish her cause of action the plaintiff requires no aid from the illegal contract. Under such a record, the illegal contract constitutes no bar to the plaintiff's cause of action. This is because of the settled rule in this State that, even though a demand is in some way connected with an illegal transaction, still recovery may be had if the plaintiff requires no aid from the illegal transaction to establish his case. Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; Beer v. Landman, 88 Tex. 450, 31 S. W. 805; Hall v. Edwards, Tex. Com. App., 222 S. W. 167."

In support of this pari delicto doctrine the Circuit Court stated that the Federal Law applicable to this case had been announced in the case of *Congress & Empire Spring Company v. Knowlton*, 103 U. S. 49. An examination of this case will disclose (1) that it was not a rate case, but one concerning the increase of the capital stock of a corporation which the defendants in error conceded that the plan adopted by the

company to increase such stock was in violation of the law of the State of New York, and (2) that the plaintiff was required to rely upon the illegal transaction to make out his case. Therefore, it has no application to the case at bar.

For authority in Texas the Circuit Court relied solely upon *Wright v. Wight & Wight*, 229 SWR 881, which was not a rate case, in which the court announced the same rule as in the Beer v. Landman case and Morrison case, above, but denied recovery to the plaintiff because the plaintiff was compelled to depend upon the illegal contract to make out his cause of action, while in the instant case, the carrier does not depend upon nor does he seek the aid of the illegal contract to make out his case.

The position of the shipper in this case is analagous to that of the plaintiff in the case of *Central Freight Lines, Inc., v. C & S Motor Freight Lines*, 125 SWR (2nd) 615. In that case negotiations between two carriers resulted in two contracts, the first of which was submitted to and approved by the Commission. Then a second contract was entered into between the parties which was not submitted to nor approved by the Commission. In construing same the court said:

> "The use of public highways for the transportation of freight for hire by motor vehicle is a matter affected with a public interest, and the Legislature, in recognition thereof, has conferred on the Railroad Commission of the State the exclusive authority in the first instance to grant, withhold or modify permits to use the roads. The Legislature has also conferred on the Railroad

Commission authority to approve the sale and transfer of such permits and has provided that no such sale or transfer shall be valid without the approval of the Railroad Commission." * * *

"The private agreement between appellant and appellee to the effect that the purchaser of said certificates should restrict the service to be rendered the public at certain points on said route was not presented to nor approved by the Commission and therefore never became binding on it. It would be a violation of both the letter and spirit of the statute above cited to permit parties by private agreement, unapproved by the Railroad Commission, to restrict the service to be rendered the public under such certificates of convenience and necessity so issued by the Railroad Commission and to enforce such agreements in the district court without joining the Commission as a party thereto, as was done in this case. It would result in stripping the Railroad Commission of its right to regulate traffic on the highways and would take from it the authority to provide for the convenience of the public in the transportation of freight. The trial court, in an independent suit to which the Commission was not a party, had no right to interfere with appellant's operations so long as they were in compliance with said certificates. See, in this connection, Texas & N. O. Ry. Co. v. Greer, Tex. Civ. App., 117 S. W. 2d 148, par. 7."

With further reference to the second contract the Circuit Court in its opinion stated:

"There was but one contract that spoke the actual intent and agreement of the parties, and

that was the amended contract under which all of the services were performed.

"We also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties."

No issue on the intent of the parties was requested nor passed upon by the trial court, and thus the conclusion by the Circuit Court relating thereto was an independent finding which it was without jurisdiction to find. *Seely Oil & Gas Co. v. Railroad Commission*, 128 Fed. (2nd) 334. However, such a finding by the Circuit Court is wholly immaterial because the good faith or the bad faith of the parties in entering into this second contract cannot change the legally prescribed freight rate of the Railroad Commission of Texas. *T. C. Ry. Co. v. Kerns*, 108 SWR 187; *Texas & N. O. Ry. Co. v. Yates*, 161 SWR (2nd) 1050; *Herrin Transportation Company v. Marmion*, 113 SWR (2nd) 291; *P. C. C. & S. L. R. R. v. Fink*, 250 U. S. 577, 63 L. Ed. 1151.

PUBLIC POLICY

The Attorney General of Texas filed an able brief in this court in support of the carrier's (petitioner) application for a Writ of Certiorari. In his brief the Attorney General carefully analyzed and pointed out the great importance of this question of public policy as it affects the State of Texas, and we respectfully invite the court's attention to his brief. Since the At-

torney General has so ably and completely covered this subject we shall not burden this court with a further discussion of the subject. However, we pause to observe that if the decision of the majority opinion of the Circuit Court should be allowed to stand then all shippers in the State of Texas, whether they be contract or common carrier, could evade the payment of the rates prescribed by the Railroad Commission by the simple device of entering into a private contract with the carrier as was done in the instant case, and thus the whole rate structure of the State of Texas could be destroyed. By the simple device of violating the law the carrier and the shipper could place themselves beyond the pale of the law—thus becoming a law unto themselves. Such a situation is incomprehensible.

The majority opinion of the Circuit Court completely failed to take this important subject of public policy into consideration, but rested the decision entirely upon the pari delicto rule. The opinion stated:

> "We agree with Appellee (carrier) that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

Such a pronouncement is another way of saying that pari delicto prevents the carrier from collecting the rates fixed by the Commission, and it is another way of saying that the shipper can escape paying the rates fixed by the Commission, simply because it entered into what the court termed a "void contract."

By this decision the Circuit Court fixed the rate by placing its stamp of approval on the "void contract," and which is void only because it violates the state statutes and public policy. Art. 1690B, *Vernon's Penal Code.*

How different this holding is from the uniform holdings of the Texas Courts as illustrated in *Railroad Commission v. Uvalde Construction Co. et al*, 49 SWR (2nd) 1113, where it is said:

> "* * * under the facts and circumstances it amounted to a definite fixation by the court of that rate. * * *"
>
> "If the carrier were authorized to initiate rates or to fix same by contract with shippers, clearly the court could properly impose such a condition, precedent to granting the injunctive relief sought. But no such power obtains in this state. Here the Railroad Commission itself fixes the rate, and that rate is conclusively presumed to be reasonable, just, and not discriminatory, until declared otherwise by a court of competent jurisdiction. If the trial court could, pending a final hearing on the merits, enjoin the carrier from collecting, and the commission from enforcing, any rate higher than that found by the court to be reasonable, we see no good reason why such could not, upon such final hearing, if it be found that the rate attacked was unlawful, make such temporary injunction permanent. To permit this would lead to chaos, and virtually transfer rate-making power from the commission to the courts."

The decisions on this subject by this court, all inferior federal courts, the Texas courts, and as far as

we can find, all other state courts, and all courts in the entire English speaking world are contrary to the majority opinion of the Circuit Court.

Judge Joseph C. Hutcheson, Jr., wrote a strong dissenting opinion. It will be remembered that Judge Hutcheson was a Texas lawyer who served for many years on the United States District Court and with nearly a quarter century of service on the Fifth Circuit. In his dissenting opinion Judge Hutcheson said:

> "I cannot agree that appellee (appellant) may in law be allowed to have the service performed without paying the statutory rate it agreed, and the law compelled it to pay. I think it clear that the district judge was right in the view he took, that the authorities in Texas leave in no doubt that rates prescribed by the Texas Railroad Commission are the only proper rates which may be charged and that a cause of action arises out of the statute in favor of any person who performs the service for which the rates are prescribed. The Railroad Commission's general order of 1931, therefore, prescribing common carrier rates as minimum rates was applicable to Steele's permit and was valid and enforceable. The supplemental contract for a less rate which was never approved by the Commission was not a valid contract of carriage, and though the parties acted, and payments were made, under it, this constitutes no defense to an action for the statutory rate. Herrin v. Marmion, 113 SW (2d) 291; Pittsburgh v. Fink, 250 U. S. 577. On the authority of Texas cases which apply the same doctrine to insurance rates that they do to carrier rates, we held in Bowen Motor Coaches v. N. Y. Casualty Co., 139

F. (2d) 332, that no contract could change the statutory rates and that they must be collected. To the suggestion made there that because the parties were in pari delicto in making an unlawful contract, plaintiff could not recover, we said, 'There was here no corrupt agreement to violate the law. No crime was to be committed.' In Battles v. Braniff, 146 F. (2d) 338, we held that no matter how illegal an agreement, to pay a less premium than the statute, was, or how illegally it was entered into, it would be ineffective to prevent recovery in a suit on the policy for the premiums the law fixed as due.

"I cannot, therefore, agree with the view of my associates, that the appellee (appellant) should be permitted to have its freight hauled for a less charge than others were under the law compelled to pay, and appellant because in pari delicto with appellee, may not recover. * * *

"But if I could agree that there was a deliberate intent to defraud the statute, I still could not agree with the majority, whether plaintiff's suit is to be regarded as on the written contract which was exhibited to and filed with the Commission, or on the right arising out of the statute to recover the legal charges for the services rendered, for the right to recover the legal charges and no other rests on an overriding public policy. This policy is so imperative that it may not be defeated by the conduct of the parties in entering into illegal and evasive arrangement which it is the very purpose of the policy to strike down."

In the majority opinion of the Circuit Court, we find the following statements:

"The statute here does not expressly authorize

a suit for the recovery of the prescribed rates by anyone."

This pronouncement is equally as strange and foreign to our Texas Law. As we analyze it, it is another way of applying the pari delicto rule. The carrier in the instant case based his cause of action upon the first written contract, that provided he would receive, and that the shipper would pay, the rates fixed by the Commission and upon the statutory liability of the shipper to pay the legal rate as fixed by the Commission.

The carrier simply prosecuted this suit as provided in subdivision 1 of Article 5527, R. C. S. of Texas, same being an "action for debt" as announced in the case of *Texarkana & W. S. Ry. Co. v. Houston Gas & Fuel Co.*, 51 SWR (2nd) 284-86.

The Texas Statute relating to motor carriers "does not expressly authorize a suit for the recovery of the prescribed rates by any one." Yet, in the case of *Herrin Transportation Company v. Marmion*, 113 SWR (2nd) 291, the motor carrier had a private contract with the shipper which provided for a rate different from that as fixed by the Commission. The court held that such contract was void and that the only rate that could apply was the rate fixed by the Commission. The carrier was allowed to recover the rate fixed by the Commission.

The Texas statute relating to railroads "does not expressly authorize a suit for the recovery of the prescribed rates by any one." We refer to the cases above cited: *Railroad Commission v. Weld & Neville*, 73 SWR 532; *Texas & N. O. Ry. Co. v. Yates, et al*, 161

SWR (2nd) 1050; and *H. & T. C. R. Company v. Johnson*, 41 SWR (2nd) 14.

The Insurance Statute of Texas "does not expressly authorize a suit for the recovery of the prescribed rates by any one"; etc., yet, in the case of *Brown & Root v. Traders & General Insurance Co.*, 135 SWR (2nd) 534, the insurance company was allowed to recover from the insured the rates fixed by the insurance Commissioner. The court said:

> "They are without power by contract, or otherwise, to alter such prescribed rate. * * * In other words, if a carrier of workmen's compensation, for instance, had collected a lower permium rate than was lawfully prescribed for carrying the risk involved, and later discovered such error, it would certainly not have to prove that it was not negligent in collecting the unlawful rate, in order to entitle it to collect the only rate which the law authorized or permitted it to collect."

Therefore, we conclude Section One of this Brief. We respectfully submit that under the authorities above cited the Circuit Court of Appeals erred in reversing the trial court on the one issue of pari delicto. We further submit that the judgment of the Circuit Court of Appeals should be reversed and that of the trial court affirmed, with costs adjudged against the respondent.

SECTION TWO

(Relating to Immaterial Issues)

The respondent filed a brief in reply to the petitioner's Application for a Writ of Certiorari in which it attempted to raise immaterial issues that were not passed upon by the Circuit Court of Appeals and not material to a determination of this case. Therefore, we shall attempt to cite the authorities that make the position of the respondent untenable, even on such immaterial issues.

SHIPPER A FOREIGN CORPORATION

The shipper in this case is a Delaware corporation with a permit to do business in Texas, and when it came into Texas it was charged with a knowledge of Texas laws, and like all other citizens—natural or artificial—it must obey such laws. When this shipper entered into the original contract with the carrier such contract became the very foundation for all subsequent negotiations. It was the basis of the application addressed to the Commission for a permit to operate over the Texas highways as a contract carrier. When the shipper sent its traffic manager to Austin to testify under oath before the Commission, and, in this manner to advise the Commission of the shipper's needs and requirements and of the nature of the proposed operation as contemplated by the written contract, the shipper became as much a party to the proceedings as the carrier himself. The shipper voluntarily came to Texas. The shipper voluntarily invoked the jurisdic-

tion of the Railroad Commission when it voluntarily entered into the contract with the carrier which provided:

> "It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

This Court in *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. page 125, 66 L. Ed. 855, stated the rule:

> "This Constitution and these laws had been in effect for five years when the Pierce Company, by applying for and obtaining the privilege of conducting its business operations within the state, elected to respect and obey them. * * *
>
> "When the large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business is considered (National Council v. State Council, 203 U. S. 151, 163; 51 L. ed. 132, 137, 27 Sup. Ct. Rep. 46; Pullman Co. v. Kansas, 216 U. S. 56, 66, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, 34 Sup. Ct. Rep. 15), the contention that this order of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law, must be pronounced

futile to the point almost of being frivolous. *'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it* (216 U. S. 56, 66); *and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional.*" (Emphasis ours.)

The shipper enjoyed every benefit that the State of Texas could grant for a contract carrier operation. Its commodities were transported over Texas highways. Yet, it does not want to pay the freight rates fixed by the State Legislature and the Railroad Commission for such transportation.

There was no discrimination because every other shipper and carrier operating in Texas is subject to same regulations to the class of which they may be members.

Having agreed to pay the rate fixed by the Railroad Commission, the shipper cannot now be heard to say that it could not fix a rate or did not fix it in accordance with law. Even if it had not agreed to pay the rate fixed by the Commission, when it agreed for the proposed carrier to apply to the Commission for authority to haul its commodities over Texas highways, it could not "while enjoying the benefits of that privilege" be heard to complain that the order fixing the rates it must pay was unconstitutional or not supported by adequate findings of fact.

In the case of *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. Ed. 390, Judge Stone said:

"The present appeal challenges the constitutionality of the order of the commission, as construed by the court, under the 14th Amendment of the Federal Constitution, both because the rate is confiscatory and because the order, which under the Kentucky statutes is not subject to judicial review, *was not supported by findings of the commission.*" * * *

"But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellants in the present suit. It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the results, assail their action on the theory that the statutes under which the action was taken offend against the Consitution of the United States (citing cases). Upon like principle, we think that appellants, who have procured action by a state commission under a state statute, may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state Constitution. Cf. Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737. The sound discretion which controls the exercise of the extraordinary powers of a federal court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked."

On pages 46 and 47 of the shipper's brief, opposing carrier's application for a writ of certiorari in this court, we find the following admissions:

"The validity or constitutionality of the Texas

Motor Carrier Act as a whole, or any part thereof, is not here attacked, except and unless a construction be placed upon Section 6-aa thereof obviously different from the intended meaning of the Legislature of Texas.

"The legality of the act of the Commission in issuing a permit to petitioner (except insofar as it is claimed that such permit fixes minimum rates to be charged) is not here questioned. It is conceded that a permit is required under the Act by every motor carrier for hire, whether common carrier or private carrier. It is also conceded that the purpose of the Act under which the permit was granted was to protect the safety and convenience of the public in the use of the highways and to preserve the highways for the general welfare, and to protect common carriers against destructive, unfair and discriminatory competition by other motor carriers in the use of the highways.

"To this end it was proper that the Commission require petitioner to apply for and obtain a permit, post a bond, not overload, and otherwise comply with the rules and regulations of the Commission designed to protect the public welfare. It is also conceded that had petitioner's operations been in competition with the operations of common carriers over the highways of the state, and had petitioner performed substantially the same services as common carriers, and had the Commission so found, the Commission could have fixed minimum rates to be observed by petitioner in order to protect the interests of common carriers."

This Court in *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288, stated:

> "Here the circumstance which justifies what otherwise might be an unconstitutional interference with the freedom of private contract is that the contract calls for a service, the performance of which contemplates the use of facilities belonging to the state; *and it would be strange doctrine which, while recognizing the power of the state to regulate the use itself, would deny its power to regulate the contract so far as it contemplates the use.* 'Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the State.' Sproles v. Binford, supra (286 U. S. at pp. 390, 391, 76 L. ed. 1180, 1181, 52 S. Ct. 581), and authorities cited." (Emphasis ours.)

We respectfully submit that the Legislature said nothing at all about the Commission entering findings of fact with reference to Section 6aa. The only requirement concerning findings by the Commission is found in Article 911b, Section 12, which reads:

> "In any contested hearing, the Commission shall, along with its order, file a concise written opinion setting forth the facts and grounds for its action, and such opinion shall be admissible in evidence on any appeal taken therefrom."

It required five printed pages to cover the findings of the Commission in the instant case, Record page 124 through 129. In this finding or order of the Commission we find the following significant statement:

> "The Commission, after carefully considering the evidence, the laws, and its own rules and regulations, is of the opinion that the character of business proposed to be done by the appellant

> strictly conforms with the definition of a contract carrier; * * * In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers."

What more could be required of the Commission than to have it carefully consider "the evidence the laws and its own rules and regulations"? Then, after considering the same, the Commission "is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier." Remember, also, that the parties to the application, Steele and General Mills, Inc., had agreed to pay the rates prescribed by the Commission. (R. 87-93.)

In *Victory Trunk Line, Inc., et al v. Red Arrow Freight Lines, Inc., et al*, 186 SWR (2nd) 98, the court said:

> "* * * and as to such contract carriers, the Railroad Commission having granted the permit, it will be presumed, absent any evidence to the contrary, that the Commission discharged the duties imposed upon it by law. At any rate, in their attack upon the order, the burden rested upon the appellees to prove the contrary. This they failed to do."

By its order or findings of fact (R. 124-129) and by issuing the certificate (R. 130) the Commission made applicable its General Order No. 25 which was issued by the Commission August 22, 1931, and the order of the Commission, amending the same, which

was known as Motor Freight Class and Commodity Tariff No. 1-A effective July 26, 1940. (R. 136.) The Commission in this manner said to the shipper "you must pay" and to the carrier "you must collect" the tariff as prescribed in General Order No. 25 as contained in Motor Class and Commodity Tariff No. 1-A. The Commission thereupon made such order a specific order for this particular operation.

The arguments by the shipper that it can successfully evade and defeat the tariff rates of the Commission because of its own interpretation of fact findings relating to Article 6aa, "must be pronounced futile to the point of being almost frivolous," *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855. Such argument finds its complete answer in the language of this court in the case of *Pacific States Box & Basket Co. v. White, et al*, 296 U. S. 176, 80 L. Ed. 138, as follows:

> "The contention is without support in authority or reason, and rests upon misconception."

The Court further said:

> "The order here in question deals with a subject clearly within the scope of the police power See Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 S. Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that

the action is arbitrary.' Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187. The burden is not sustained by making allegations which are merely the general conclusions of law or fact. See Public Serv. Commission v. Great Northern Utilities Co., 289 U. S. 130, 136, 137, 77 L. ed. 1080, 1085, 1086, 53 S. Ct. 546. Facts relied upon to rebut the presumption of constitutionality must be specifically set forth. See Aetna Ins. Co. v. Hyde, 275 U. S. 440, 72 L. ed. 357, 48 S. Ct. 174; O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A. L. R. 1163; Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7." * * *

"Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; and A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare Aetna Ins. Co. v. Hyde, 275 U. S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174."

Mr. Justice Brandeis speaking for this court in the case of *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 80 L. Ed. 1033-1058, said:

> "Whenever a legislative body regulates a subject within the scope of its power, a presumption of constitutionality prevails, in the absence of some factual foundation of record for overthrowing the regulation, O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 257, 258; 75 L. ed. 324, 327, 328, 51 S. Ct. 130, 72 A. L. R. 1163, and this rule extends to such action by an administrative body. Pacific States Box & Basket Co. v. White, 296 U. S. 176, 185, 186, ante, 138, 56 S. Ct. 159, 101 A. L. R. 853." * * *
>
> "But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."

We invite the court's attention to the holdings of the Texas Courts on this point. *Texas Employers' Ins. Ass'n. v. Ezell*, 14 SWR (2nd) 1018:

> "Where one invokes the jurisdiction of a court and recovers judgment in accordance therewith, he will not be heard thereafter to say such court had no jurisdiction and that its award to him was therefore void. Such course is condemned by the highest considerations of public policy. He is estopped to make such plea, * * *."

Spence v. State National Bank, 5 SWR (2nd) 754:

> "Undoubtedly having general jurisdiction over the subject-matter, a failure to observe the requirements of the statute in the particular question under consideration is procedural, and at most would only render the judgment voidable upon a direct attack."

Security Trust Co. of Austin v. Lipscomb County, 180 SWR (2nd) 151:

> "Upon collateral attack the validity of a judgment cannot be determined except by the record. Stockyards Nat. Bank v. Presnall, 109 Tex. 32, 194 S. W. 384. Unless the record negatives the existence of facts that are essential to the court's jurisdiction, the law conclusively presumes upon collateral attack that those facts were established by the evidence. Crawford v. McDonald, 88 Tex. 626, 630-632, 33 S. W. 325; Templeton v. Ferguson, 89 Tex. 47, 33 S. W. 329; Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; Carrol v. McLeod, 133 Tex. 571, 577, 103 S. W. 2d 277." * * *
>
> "Accordingly, the invalidity of the contracts is not shown by the record in that case, and, this being true, it is conclusively presumed that the court found that the contracts were valid." * * *
>
> "The fault in this position is that it assumes that jurisdiction of a court depends, not upon the character of the case, but upon the court's action in deciding it. As said in Commonwealth of Massachusetts v. Davis, 150 Tex. 398, 405, 168 S. W. 2d 216, 220, the court 'had authority to decide this question either rightly or wrongly.' See also Moore v. Blagge, 91 Tex. 151, 1611, 38 S.

W. 970; Swift & Co. v. United States, 276 U. S. 311, 330, 48 S. Ct. 311, 72 L. Ed. 587, 599. We hold, for the reasons given, that the orders approving the contracts were not void."

STANDARDS FIXED BY LEGISLATURE

In the caption of H. B. 335, which is Article 911b, Sections 1 to 22, V. A. C. S., of the Forty-second Legislature, one finds the following significant language:

> "An Act to amend Chapter 314, General Laws of the State of Texas, Forty-first Legislature, * * * providing that no motor carrier shall hereafter operate as a common carrier without having a certificate of convenience and necessity and that no motor carrier shall hereafter operate as a contract carrier without having a permit; giving to the Railroad Commission of the State of Texas power and imposing upon it the duty to fix, prescribe or approve maximum or minimum or maximum and minimum rates, fares and charges for motor carriers doing business as common carriers and minimum rates, fares and charges for motor carriers operating as contract carriers."

An examination of Article 911b, Sec. 6aa, will disclose (1) that the Legislature of Texas, by the enactment of that section, found that a contract carrier would be in competition with common carriers, and (2) it found that the services to be rendered would be substantially the same service as common carriers.

> "Sec. 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competi-

> tion with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

It must be presumed that the Legislature had before it and took into consideration all of the facts necessary and essential to the enactment of the law. *Pacific States Box* case by this court, 296 U. S. 176, 80 L. Ed. 138, and for Texas cases see *State v. Lone Star Gas Co.*, 129 SWR (2nd) 1164. Also *Railroad Commission v. Rapid Transit Co.*, 92 SWR (2nd) 261, and we quote from the opinion in the latter case as follows:

> "The order was one which the commission had authority to make and was therefore presumptively valid. The burden was upon appellees to show that this finding of the commission had no reasonable factual basis for its support. This burden was not met, and the trial court therefore erred in setting aside the order. The law upon this question is now so thoroughly settled as to require only a reference to the leading cases thereon. Railroad Commission v. Shupee (Tex. Civ. App.), 57 S. W. (2d) 295, affirmed 123 Tex. 521, 73 S. W. (2d) 505; Railroad Commission v. Winkle (Tex. Civ. App.), 57 S. W. (2d) 287; Texas Motor Coaches v. Railroad Commission (Tex. Civ. App.), 59 S. W. (2d) 923; affirmed 123 Tex. 517, 73 S. W. (2d) 511; Railroad Commission v. George A. Scott Truck Line (Tex. Civ. App.), 57 S. W. (2d) 293; Railroad Commission v. Inter-City F. Co. (Tex. Civ. App.), 57 S. W. (2d) 290; Railroad Commission v. Winkle (Tex. Civ. App.),

57 S. W. (2d) 287; Railroad Commission v. McDonald (Tex. Civ. App.), 90 S. W. (2d) 581."

When the Legislature enacted the Statute which requires contract carriers to charge as high rates as competitive common carriers rendering substantially the same service, it did not have in mind the quality or standard of service to be performed as between the carriers. Obviously, one carrier may have more modern and more commodious equipment, and render more rapid and more efficient service than the other. The difference in personnel and the little details of service offered by one may mark him as rendering an outstanding service to his shippers far above what his competitor, common or contract, may render. But the basic and fundamental fact remains that insofar as they haul commodities for hire over the same highways in trucks and between common points they are in competition. This is a matter of common knowledge. And insofar as they haul the same class of commodities the same distance over the same highways they are rendering substantially the same service and the act recognizing these facts of common knowledge requires that there shall be no discriminatory minimum rates under such circumstances. One must not be less than the other. So says the Texas statute.

The Legislature did not leave the determination of these basic and fundamental facts to the Railroad Commission or the courts. It decided for itself that under such circumstances common carriers and contract carriers were in competition and were rendering

substantially the same service, and should collect the same minimum tariff.

The function of the Commission is to classify commodities for rate purposes by means of its own choosing. Whether one rate or the other is to be charged is determined by a proper classification of the cargo. If a contract carrier and a common carrier are hauling the same class of commodities the same distance over the same routes, they are, as a matter of law, under the act, in competition and are rendering substantially the same service and contract carriers must collect as minimum the same rates. Neither the Commission nor the courts has any jurisdiction to hear evidence and determine whether this is true.

Therefore, it makes no difference whether the Commission failed to find specifically that such facts existed or even failed to hear evidence on the question. Its function ceased when it provided, as it did in this case, the schedules of rates for the various classes of commodities and said common carriers transporting them for hire must charge the rates povided in the tariff schedule for each class of commodities hauled and that contract carriers must charge the same rates as minimum.

It follows without argument that the trial court could not hear and determine these basic and fundamental questions for itself, and, the answers of the jury, to the questions submitted, are immaterial. Likewise, the defense that the tariff rates do not apply and cannot be collected because the contract carrier in this

case was not in competition with and not rendering substantially the same services as common motor freight carriers cannot be maintained because the Legislature foreclosed that issue.

Mr. Chief Justice Alexander of the Supreme Court of Texas in discussing the question of findings by an administrative agency in the case of *Railroad Commission et al v. Shell Oil Company, Inc., et al*, 161 SWR (2nd) 1022-1030, said:

> "In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same."

The Chief Justice writing in another case, decided on the same day, in discussion the subject in *Cook Drilling Company v. Gulf Oil Corporation*, 161 SWR (2nd) 1035, said:

> "As is well known, hearings before the Commission are informal. In the vast majority of instances its orders are not contested. It would be placing a useless and intolerable burden on the Commission to require it to make an 'appeal-proof' record in every instance. The rights of the parties will be fully protected if, upon a contest of the order in the district court, the parties are given full opportunity to show that at the time the order was entered there did, or did not, then exist sufficient facts to justify the entry of the same."

An interesting case on this subject decided by this court and involving the Texas Railroad Commission is that of *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510:

> "It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the evistence of facts justifying the specific exercise. Pacific States Box & Basket Co. v. White, 296 U. S. 176, 185, 80 L. ed. 138, 146, 56 S. Ct. 159, 101 A. L. R. 853."

In the language of this court in the case of *United States v. Berwind-White Coal Min. Co.*, 274 U. S. 564, 71 L. Ed. 1205-1217:

> "The contention that findings of the Commission concerning discrimination were unsupported by evidence, or that findings essential to the order are lacking, rests largely upon a misconception." * * *
>
> "The argument overlooks the difference in the character between a general rule prescribed under and a practice for particular carriers ordered or prohibited under Secs. 1, 3 and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to lgeislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of

its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general."

This court has already approved the standards fixed by the Texas Legislature to govern the Commission in its promulgation of rates for contract carriers under Section 6aa in the case of *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288:

"What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants (citing cases). * * *

"We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its

aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid. Ellis v. United States, 206 U. S. 246, 256, 51 L. ed. 1047, 1052, 27 S. Ct. 600, 11 Ann. Cas. 589. Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state."

See also *Railroad Commission v. Intercity Forwarding Company*, 57 S. W. (2nd) 290; *Britton v. Smith*, 82 S. W. (2nd) 1065.

COLLATERAL ATTACK AND APPEAL STATUTE

In the language of Mr. Chief Justice Stone in the case of *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. ed. 391, the objections relating to findings of fact "are not available to appellants (shipper) in the present suit," for the reason that the rate orders of the Commission (R. 133-137), the order of the Commission authorizing the operation (R. 124) and the Permit issued by the Commission (R. 130) are regular on their face and therefore the defense as urged is a collateral attack. This case was tried in the United States District Court at Fort Worth by reason of diversity of citizenship and any attack on the orders of the Commission would be a collateral attack. Section 20, Article 911b, provides in part:

"If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant, etc."

The record in this case is clear that the shipper did not attempt "to get relief from the Commission" (R. 244-5), as provided by the Texas Statute. See *Greer v. Railroad Commission*, 117 S. W. (2nd) 142-145, as follows:

"The legislature has provided ample means to protect those aggrieved by 'any decisions, rate, charge, rule, order, act or regulation adopted by the Commission,' through resort to the courts by direct appeal. Art. 911b, Sec. 20. Such right of appeal, however, is granted only 'after failing to get relief from the Commission.' This language in the section clearly indicates that the legislature had in mind that rules, etc., of the Commission might not operate fairly upon all motor carriers, and to determine such issues the Commission was most suitably circumstanced. Aggrieved parties were therefore required to seek relief from the Commission, before resort could be had to the courts. Mr. Mark Mashall, Chairman of the Motor Transport Division of the Commission, testified that it was the Commission's construction of the law that it was required to hear and determine applications for such relief, and that such proce-

dure would have been followed in Greer's case had he made the application. All other special commodity permit holders had acquiesced in the order in question.

"It is the rule in the Federal Supreme Court that relief against rules of administrative boards will not be granted until after it has been sought of and denied by such boards. Red 'C' Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 32 S. Ct. 152, 156, 56 L. ed. 240; Peterson Baking Co. v. Bryan, 290 U. S. 570, 54 S. Ct. 277, 78 L. ed. 505, 90 A. L. R. 1285. We quote from the former (Chief Justice White writing):

" 'We have not attempted to enumerate the objections urged against the rules and regulations adopted by the board of agriculture. The Court below was clearly right when it observed that if, as the complainant alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them.'

"This holding is in accord with the general doctrine that one aggrieved by the acts of administrative officials or boards must first exhaust his legal remedies before resort to the courts. See 37 Tex. Jur., p. 918, Sec. 54, from which the following: 'A petition which fails to allege that the plaintiff has resorted to the proper school authorities before appealing to the courts is insufficient to confer jurisdiction'."

It is not contended by the shipper that the rates

fixed by the Commission in this case have ever been brought in question as provided by Article 911b, Sec. 20, by direct appeal to a District Court in Travis County, Texas. The present case is not an appeal as provided by the statutes.

In construing this Statute our Texas Courts have uniformly held attacks upon the orders of the Railroad Commission must be filed in the District Court of Travis County in Austin, Texas. See *Alpha Petroleum Company v. Terrell*, 59 S. W. (2nd) 364, wherein the court said:

> "Under the plain terms of the above-quoted statute we are compelled to hold that any suit which seeks to annul, modify, or set aside any rule of the commission valid on its face, promulgated by authority of the terms of chapter 26, supra, sec. 15 (Vernon's Ann. Civ. St. art. 6029), must be brought in a district court of Travis County, Texas, and that this requirement is one of jurisdiction, and not a mere question of venue. We further hold that, if the rule is one utterly void on its face, it may be attacked in any court otherwise having jurisdiction of the case. We finally hold, however, that, if it requires evidence to show the invalidity of the rule, it is not void on its face, and is not subject to collateral attack or to attack in any court, except a district court of Travis County."

In the case of *Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas* (Com. of App.), 113 SWR (2d) 679, the court held:

> "The orders of the Railroad Commission are to

> be likened to the judgments of courts. While the commission is not a part of our judiciary system, nevertheless its duties are quasi judicial, and its functions, in many respects, are those of a court. Aransas Harbor, etc., Co. v. Taber (Tex. Com. App.), 235 S. W. 841; Railroad Commission of Texas v. San Antonio Compress Co. (Tex. Civ. App.), 264 S. W. 214, writ refused; M. K. & T. Ry. Co. v. State (Tex. Civ. App.), 275 S. W. 673. Whether it be treated as a tribunal of general or limited jurisdiction, the sanctity of its orders is the same. All of our courts are courts of limited jurisdiction, but, once they hear and determine a matter within their jurisdiction, the judgment becomes final as against all collateral attacks."

Chief Justice Cureton, speaking for the Supreme Court in *Mingus v. Wadley*, 285 S. W. 1084, stated the rule as follows:

> "In special proceedings not within the common-law jurisdiction, the court's statutory designation of the venue is mandatory and jurisdictional."

As pointed out above, five printed pages in the record were required to print the findings of the Commission in this case. Yet, the shipper complains that additional findings were necessary before the Commission can fix rates. However, the shipper went before the Commission, through its traffic manager, and so far as this record is concerned no request was made for such additional finding. The leading case in Texas on this question is *Texas Steel Company v. Fort Worth & Denver*, 40 S. W. (2nd) 78, wherein the contention

was made that the rate order of the Commission was made without notice:

"The steel company in effect contends that the railroads have been charging for intrastate shipments of steel rates promulgated by the Texas Railroad Commission, but that the orders of the Railroad Commission by authority of which such rates and charges have been made are utterly void, and therefore subject to collateral attack in a court other than a district court of Travis County, Texas." * * *

"It is the settled law of this state that the Railroad Commission is a quasi judicial body. Producers' Refining Co. et al. v. M. K. & T. Ry. Co. of Texas (Tex. Com. App.), 13 S. W. (2d) 679.

"Since the Railroad Commission is a quasi judicial body, it follows that an order regular upon its face, made by the commission, is not subject to collateral attack. Articles 6452, 6453 R. C. S. of Texas 1925; West Texas Compress Co. v. Railway Co. (Tex. Com. App.), 15 S. W. (2d) 558; Producers' Refining Co. v. M. K. & T. Ry. Co., 13 S. W. (2d) 679; Id. (Tex. Com. App.), 13 S. W. (2d) 680; Railroad Commission v. Weld, 95 Tex. 278, 66 S. W. 1095; M. K. & T. Ry. Co. of Texas v. Railroad Commission (Tex. Civ. App.), 3 S. W. (2d) 489; Empire Gas & Fuel Co. v. E. L. Noble et al. (Tex. Com. App.), 36 S. W. (2d) 451." * * *

"We think that a casual reading of the certificate will demonstrate that the orders of the commission here attacked as null and void are regular on their faces. All the grounds urged to nullify such orders require the court to go behind them to ascertain the facts, and do not appear on the

face of such orders. It has long been settled in this state that such an attack is collateral.

"If an order of the commission regular on its face can be collaterally attacked on the ground of want of notice, or any other ground here urged, then the orders and rates of the commission could be rendered null and void in a proceeding in which the commission was never given an opportunity to be heard either on the facts or the law. Furthermore, different courts might reach conflicting conclusions as to the facts involved in the same order. This demonstrates the wisdom of the statute and the correctness of the rule here announced. The Legislature recognized in the beginning that to allow such attacks would lead to intolerable results, and foreclosed the right to do so by the statute prescribing the manner and the court in which the rules and rates of the commission can be subjected to judicial review. At this point we wish to state that we do not want to be understood as holding that we would hold these orders illegal in a direct proceeding. We do not pass on that matter, as we have no such proceeding here. What we do hold is that the orders here attacked are not subject to be called in question except in a direct proceeding brought in full conformity with the provisions of article 6453, supra."

This Court has had occasion to consider the appeal statutes concerning orders of the Texas Railroad Commission. *Burford v. Sun Oil Co.*, 319 U. S. page 315, 87 L. Ed. 1424, leaves no doubt that this Court has held that an appeal from the orders of the Railroad Commission must be in a District Court of Travis County, Texas, whether State or Federal. In this case

the defense urged by the shipper was an attack upon a rate order of the commission in the United States District Court at Fort Worth. Therefore, this defense could be nothing less than a collateral attack.

The Appeal Statute considered by this court in the Burford case above, relating to oil and gas and pertaining to venues and jurisdiction in Travis County, is almost identical with Section 20 of Article 911b above, which is under consideration in this case.

It therefore follows without argument that the defense urged by the shipper in the instance case was a collateral attack, and that such defense would not even be available on an appeal to a district court in Travis County because the shipper has not first sought relief from the Commission. Furthermore, by whatever name the shipper may designate this defense it can be nothing more than a collateral attack which is not available to a shipper in the United States District Court when the only basis of jurisdiction is that of diversity of citizenship.

STATUTE OF LIMITATION NOT APPLICABLE

The shipper in this case pleaded the Two Year Statute of Limitation which relates to contracts that are not in writing. Art. 5526. The trial court held that the Statute was not applicable. (R. 94 and 98.) The original contract between the carrier and the shipper was an instrument in writing which provided that the shipper would pay and the carrier collect the rates as prescribed by the Railroad Commission of Texas. Therefore, the only Statute of Limitation applicable

to this operation would be the Four Year Statute, Art. 5527. All of this operation was within a period of three years. This subject was discussed and the contention of the shipper in this case was foreclosed in the case of *Texarkana & S. Ry. Co. et al v. Houston Gas and Fuel Co.*, 51 SWR (2nd) 284, and the many cases cited therein which case went to the Supreme Court on the certified question as follows:

> "Did the four-year rather than the two-year statute of limitations apply to the appellee's cause of action for the refund sued for?"

Judge Critz held that the four-year statute of limitations was applicable and after citing many cases said:

> "We think it is equally as well settled as the law of this state that a suit for overcharges for freight shipped on a written bill of lading is a suit for debt within the meaning of subdivison 1 of article 5527, R. C. S. 1925. This proposition is grounded on the fact that the term 'actions for debt,' which are required by the above-cited article to be commenced within four years after the cause of action shall have accrued, include all suits brought to recover money for the breach of contract in writing without regard to the technical distinction between actions and suits, and debts and damages at common law. Robinson v. Varnell, 16 Tex. 382. See, also, authorities above cited."

CONCLUSION

For the reasons stated we respectfully submit that the pari delicto doctrine cannot be applied to defeat the legally established freight rates of the Texas Railroad Commission. That the public policy of the State of Texas, as pointed out in the brief of the Attorney General in this case, overrides private interests and requires that the legal rate fixed by the Texas Commission be applied in the instant case.

WHEREFORE, petitioner prays that the judgment of the Circuit Court of Appeals be reversed and that of the trial court affirmed, for costs and appropriate orders in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cecil A. Morgan, attorney of record for petitioner, Leo H. Steele, hereby certify that a copy of the foregoing Brief of Petitioner has been served upon Charles E. France and the firm of Miley, Hoffman, France & Johnson, whose post office address is First National Bank Building, Oklahoma City, Oklahoma, and Alfred McKnight and the firm of Cantey, Hanger, McMahon, McKnight & Johnson, whose post office address is 1500 Sinclair Building, Fort Worth 2, Texas, attorneys for respondent, General Mills, Inc., by personally delivering two copies thereof to Alfred McKnight, one of the attorneys and a member of the firm of Cantey, Hanger, McMahon, McKnight & Johnson, on this ..... day of October, 1946.

CECIL A. MORGAN,
Attorney for Petitioner

I, Alfred McKnight, one of the attorneys of record for respondent General Mills, Inc., hereby acknowledge receipt of two copies of the foregoing Brief this ..... day of October, 1946.

ALFRED McKNIGHT
Attorney for Respondent

FILE COPY

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No. 1056

Supreme Court of the United States

(OCTOBER TERM, A.D. 1945)

LEO H. STEELE,
Petitioner,
VERSUS
GENERAL MILLS, INC.,
Respondent.

OPPOSING BRIEF OF GENERAL MILLS, INC., TO THE PETITION AND BRIEF OF LEO H. STEELE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND TO THE BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF THE STATE OF TEXAS IN SUPPORT THEREOF

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No. 1056

Supreme Court of the United States

(OCTOBER TERM, 1945)

LEO H. STEELE,
Petitioner,
VERSUS
GENERAL MILLS, INC.,
Respondent.

OPPOSING BRIEF OF GENERAL MILLS, INC., TO THE PETITION AND BRIEF OF LEO H. STEELE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND TO THE BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF THE STATE OF TEXAS IN SUPPORT THEREOF

To the Honorable, the Justices of the Supreme Court of the United States:

Substantially the same questions are presented in the application and brief of petitioner and in the *amicus curiæ* brief of the Attorney General of Texas. Substantially the same arguments were presented to the Circuit Court of Appeals and rejected by that Court. It is respondent's view that this case involves purely a private controversy; not one in which the State of Texas, through its Attorney General, has any legitimate interest; that no question of public interest or public policy is involved; and that the

judgment of the Circuit Court of Appeals is correct. The recovery afforded petitioner in the trial court inured to him alone, not to the State of Texas. Petitioner, and not the State of Texas, benefits if such recovery is sustained. Separate replies to the petitioner's application and brief and to the brief of the Attorney General of Texas would be duplicitous. We therefore take this opportunity of presenting a joint reply to both.

I. PRELIMINARY STATEMENT

The facts involved, to the extent necessary to the determination of the cause on the basis it was disposed of by the Circuit Court of Appeals, are stated in the opinion of that Court. We deem it appropriate, however, to briefly state the following additional facts:

In the year 1940 and for some time prior thereto the petitioner Steele was an employee of respondent, General Mills, Inc., in charge of the transportation by truck of certain products of respondent from its Oklahoma City plant, where petitioner was stationed. Respondent entered into a contract with an independent contractor at its Oklahoma City plant to haul a certain class of its products from the plant direct to its customers instead of making such deliveries direct in trucks of respondent, as had previously been the custom. The new transportation arrangement at Oklahoma City was on a cost plus basis; that is, the contractor received his costs, plus 10% as compensation for hauling and delivering the products. Respondent thought it desirable to make a similar arrange-

ment at Wichita Falls and tentative plans were worked out with petitioner whereby he would leave the employ of respondent, move to Wichita Falls and enter into a transportation arrangement similar to the arrangement then in effect at Oklahoma City. Preparatory to putting the agreement into effect, petitioner did move to Wichita Falls, Texas, and for a time superintended the transportation and delivery by truck of the products of respondent from its Wichita Falls plant. While petitioner was at Wichita Falls, and prior to the commencement of the arrangement here involved, respondent forwarded to him a contract to be executed similar to the contract in effect at Oklahoma City, expressly providing that petitioner would be paid for his services the actual cost thereof, plus 10% and plus some additional administrative charges. It was also contemplated that respondent would sell petitioner the trucks then in use by it and these trucks, suitably adapted for that purpose, would be used by petitioner in transporting respondent's products. Petitioner thereupon submitted the proposed contract to his attorneys in Fort Worth (the same attorneys now representing him in this litigation) and Mr. Morgan, one of his attorneys, wrote him on February 28, 1941, as follows (R. 188):

"Dear Mr. Steele:

"Since you left this morning, I have again carefully considered the proposed contract to be entered into between you and General Mills.

"Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they

must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

"'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.

"Mr. Steele:

"P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.

"Special delivery."

A copy of this letter was delivered to Mr. Colfix, the division comptroller of respondent, at Oklahoma City. After correspondence between the parties, Mr. Christopher, a member of the firm representing petitioner, wrote Mr.

Colfix, of respondent, quoting Section 6aa of Article 911b, Texas Civil Statutes, and concluded his letter with the following statement:

> "I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or yourself with reference to this matter the next time Mr. Steele is in the office."

A conference was arranged in the early part of April, 1941, at which time there were present Colfix, petitioner, and Mr. Christopher, one of the attorneys for petitioner. Colfix, at the trial of the case, testified without contradiction as follows (R. 198):

> "I indicated to these gentlemen that the form of contract that they proposed to us was entirely different than the understanding that Mr. Steele and our company had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally execute a supplemental contract for the type of service that would be rendered by Steele for us.
>
> "I indicated to these gentlemen that our company

had a great deal of confidence in Mr. Steele, and that we never expected to have any difficulty with Mr. Steele in this type of contract, but I did wonder if there was any possibility that some later Court ruling or interpretation being made that the Railroad Rates could apply to the contract that we had, and they informed me again that the contract was a legal contract, that it was an agreement between two parties and that the Railroad rates for common carriers would not apply to our operation and that we would have nothing to worry about.

"Mr. McKnight: You say the contract was a legal contract; to what contract do you refer?

"A. I refer to the original contract as suggested by them, supported with a supplemental contract for charges. You see the original contract had not basis for charges under the theory that the Railroad Rates did not apply, and we must have charges, between individuals.

"Q. And that was what you expected to put in your supplemental contract, the agreement with respect to rates?

"A. That is correct.

"Q. That was to what your conversation was directed?

"A. That's correct."

And further (R. 264):

"Q. All right, I will ask you this question, Mr. Colfix, in this conversation you had with Mr. Christopher and Mr. Steele, in the office of Mr. Christopher in Ft. Worth on April 11, 1941, I believe it was, according to the date of this letter, was there any suggestion

made by Mr. Christopher at that meeting that this supplemental contract be submitted to the Railroad Commission?

"A. No, no such suggestion was made."

Neither petitioner nor his attorney, Mr. Christopher, testified at the trial of the case, though both were present. The testimony of the witness, Colfix, is undisputed.

Following this conference Mr. Christopher wrote and forwarded to Colfix the following letter (R. 200):

"This is in reference to and confirms our conversation of this morning while you and Mr. Steele were in the office. It will also supplement our letter to you of April 3rd.

"It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges as have been prescribed by the Railroad Commission of Texas, that being under the provisions of the statute of, as quoted to you in my letter of April 3rd, copy of which is also enclosed herewith.

"In my letter to you of April 3rd, I pointed out the fact that the Railroad Commission has attempted to prescribe rates for contract carriers, that being contained in Railroad Commission of Texas Tariff Circular No. 2-A, which fixes a minimum rate for contract carriers only, at the rates prescribed for common carriers.

"You will especially observe the language of the statute which contains the following language:

" 'The Commission shall prescribe minimum rates, fares and charges to be collected by such con-

tract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.'

"Of course, you have not had any experience with the service of contract carriers, but you do anticipate that the service to be rendered under the contract which you propose to make will not be a serivce which will be in any respect 'substantially the same service' as is rendered by common carriers, for the simple reason that this contract carrier, if you enter into a contract and if the permit is approved, will devote all of its time and attention to you exclusively and to no other member of the general public. The trucks which he operates will be dedicated to your service alone and will not operate in the service of any other member of the general public. He will be subject to your direction and command at all times the same as his trucks will be and will have no regular schedules and no regular routes as common carriers must have, his trucks will be ready to operate from Wichita Falls or from other points at any hour of the day or night which you may direct in order to render the service which you require and will operate over most direct routes to any destination to which your commodity will move without awaiting scheduled departure times and without the interlining of the shipments at connecting carrier points, as well as many other services which cannot at all be rendered by common carriers.

"It may not, therefore, be said that the service which will be rendered by this contract carrier can never in any event be a substantially similar service to that rendered by common carriers.

"The Railroad Commission of Texas, in the almost ten years now since the Truck Law was passed as it now exists has not at any time undertaken an investi-

gation of the services rendered by contract carriers nor have they undertaken any investigation of the cost of such service or any of the other factors which would enter into rate making. Of course, you do not know about these costs or advantages either, because you have not operated with the benefit of a contract carrier. Just what operating cost would be and what particular advantages will be worth then as may be anticipated cannot now be determined by you without some experience.

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supplemental contract be entered into based upon the service rendered. That such an arrangement will not be violative of the provision of the statute quoted in my letter of April 3rd, for the very simple reason that the two services, that is, contract and common carrier service, cannot be compared so that it can never be said that the two services rendered could be 'substantially the same.'

"We have given considerable thought to various other elements entering into consideration of whether or not you should make this contract as suggested by yourself this morning, that is various contingencies that might arise following the execution of the contract and the institution of the operation. We think, however, that you fully understood our position with reference to those matters and I do not believe that any complication could possibly arise on account of any of those things, and since it is my impression that you wished our opinion with reference to the

particular section of the statute involved along we do not assume that it is necessary for us to discuss those matters.

"Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and the service actually rendered in comparison to service of common carriers. To me, however, it is simply a reasonable business risk, if it is a risk, which you can afford to take.

"Very truly yours,

"tsc/ds "T. S. CHRISTOPHER."

Following receipt of this letter, one of the attorneys for respondent in Oklahoma City conferred with petitioner's attorney over the telephone and thereafter an amendment was made to paragraph 13 as proposed by petitioner's attorneys so as to add the following phrase:

"For the kind and character of service to be rendered hereunder." (R. 203).

This language is found in the contract as executed (R. 116-122). Thereafter Colfix wrote Mr. Christopher a letter of date April 17, 1941, as follows (R. 204):

"Yesterday you discussed with Mr. France a change in paragraph 13 of the contract between Mr. Steele and General Mills. As a result of this conversation you both agreed to add the following phrase to the end of Paragraph 13, 'for the kind and character of service to be rendered hereunder.' We have made this change and have executed two copies of the contract which are being sent to you at this time.

"After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills.

"I did not indicate the date of execution on Page 1 and page 5, as I thought it might make some difference as to whether or not the present date was indicated or whether you wanted to go back to the time you started your hearings with Railroad and Warehouse Commission. Will you please investigate this date and advise me in order that I might place it on my copy."

The date, August 26, 1940, was inserted in the contract, although it was not actually agreed upon and executed until about April 17, 1941 (R. 206). Following the letter to Mr. Christopher last referred to, a supplemental agreement was drawn up and agreed to between the parties (R. 206) and is found in the Record at page 208. It was delivered to petitioner Steele personally at Oklahoma City or mailed to him at Wichita Falls. He executed the agreement and returned it to Colfix. The supplemental agreement is dated July 31, 1941, and amends Paragraph 13 of the original agreement. Although the tariff relied upon by petitioner was in effect at the time, it is recited in the supplemental agreement that the Railroad Commission of Texas had not fixed any "rates, charges or tariffs for the kind and character of services to be rendered under said contract" and the parties thereupon set forth the amount of compensation to be paid petitioner by respondent. This compensation generally was based upon petitioner's costs, plus 10%, plus certain administrative charges, and evi-

denced the real agreement between the parties from the inception of the negotiations. No transportation services were performed by petitioner until after the execution of the supplemental agreement. It was in full effect during all the times involved. Petitioner's operations started on August 1, 1941, and continued through October 31, 1943, a period of twenty-seven months. Each month petitioner billed respondent for services strictly in accordance with the terms of the supplemental agreement and was paid on that basis currently (R. 214-217). In this connection the witness, Colfix, testified, without contradiction (R. 217):

> "Q. Now, during the entire period of this operation, before its termination, some twenty-seven months after it started, did Mr. Steele ever make any claim to you that he was entitled to be paid on the basis of the Railroad Commission's tariff rates?
>
> "A. No, sir.
>
> "Q. Was there any such claim as that ever presented to you until after the termination of this agreement?
>
> "A. None."

Petitioner filed, on or about August 26, 1940, with the Railroad Commission of Texas, an application for a contract carrier permit to haul exclusively for General Mills. This application contains a statement that the rates to be charged would be those promulgated by the Railroad Commission of Texas (R. 70). This was long before the actual agreement was entered into.

Respondent was not a party to this application and knew nothing of its contents (R. 190). The order of the Railroad Commission granting in part and denying in part the permit was entered June 16, 1941 (R. 125) and the permit itself is dated July 9, 1941 (R. 130). It was definitely agreed by the parties and believed by respondent, that the Railroad Commission had not fixed rates, charges or tariffs for the character of services to be performed by petitioner under the contract here involved, and it was therefore necessary to provide for the amount to be charged and paid for the services to be rendered. Hence the supplemental agreement of July 31, 1941. [Testimony of Colfix (R. 325).]

II. ISSUES BEFORE THE TRIAL COURT

The assertion is made in petitioner's brief that "the point on which the Circuit Court of Appeals reversed and rendered judgment was not even raised in the trial court." (page 26). Similar statements are also elsewhere made in the brief. Numerous defenses were presented by respondent in the trial court which are succinctly stated in the opinion of the Circuit Court of Appeals. The exact point upon which the Circuit Court of Appeals disposed of the case was presented to the trial court. Reference is here made to Paragraphs 14 and 15 of respondent's trial answer (R. 63-66). At the conclusion of the evidence respondent presented to the trial court a motion for an instructed verdict, urging as a ground therefor the very point upon which the Circuit Court of Appeals decided the case [see Paragraphs 7 and 8, respondent's motion

for an instructed verdict (R. 359-360).] It is apparent that the statements made by counsel for petitioner are obviously incorrect.

In addition to the point upon which the Circuit Court of Appeals decided this cause, respondent presented, among others, the following substantial defenses in the trial court, which were brought forward as Specifications of Error in the Circuit Court of Appeals:

(1) The evidence failed to disclose that the Railroad Commission tariffs relied upon by petitioner were applicable to the transportation services performed by petitioner, this because the evidence disclosed and the jury found that the operations of petitioner were not in competition with those of common carriers and that the services performed by petitioner were not substantially the same as those performed by common carriers.

(2) The order of the Commission granting petitioner a permit and the permit itself, if construed as an order applying the Commission tariffs to the transportation to be performed by petitioner were to that extent void upon their face because the Commission failed to find the facts requisite to authorize it to fix rates for the services involved. The lawmaking body of Texas delegated only special and conditional power to the Commission to fix rates for contract carriers. Before that power may be exercised it must affirmatively appear and the Commission must find that the operations of the contract carrier over the highways of Texas are in competition with common carriers and then the minimum rates prescribed shall not

be less than the rates prescribed for common carriers for substantially the same service. The Commission failed to find the requisite facts authorizing it to fix rates and such facts did not appear in the record.

(3) The evidence disclosed and the jury in the trial court found that the operations of petitioner over the highways of Texas were not in competition with the operations of common carriers and that the services performed by him were not substantially the same as services performed by common carriers. Hence the basis for any attempted acts of the Railroad Commission to fix rates failed.

(4) Petitioner was essentially a private carrier hauling exclusively for respondent under a private contract of carriage. His services were not substantially the same as those of a common carrier nor did he operate in competition with common carriers. There was, therefore, no such public interest involved as would justify the State to assume jurisdiction over the compensation paid by respondent to petitioner. Such compensation had no reasonable relation to the safety of the highways nor could it adversely affect common carriers. If, in fact, the Legislature of Texas did confer power upon the Commission to fix the compensation to be charged by petitioner to respondent, and if, in fact, the Commission undertook to exercise such power and fix such compensation or rates to be charged, then the statute of the State of Texas, to the extent stated, and the acts of the Commission thereunder, deprived respondent of its property without due process of law and interfered with its freedom of contract in violation of the

Fifth and Fourteenth Amendments to the Constitution of the United States.

Only two issues were presented in the trial court upon which there were conflicting facts. These issues were whether petitioner's operations were in competition with common carriers over the highways of Texas and whether the services performed by him were substantially the same services as those rendered by common carriers. Petitioner insisted upon the affirmative of both these issues; respondent the negative. The evidence relating to all other issues in the case was undisputed. The trial court submitted to the jury these two issues of fact upon which there was conflicting evidence. The jury resolved both issues by special verdict in favor of respondent. The special verdict was supported by competent evidence. The trial court did not set it aside but thereafter rendered judgment in favor of petitioner, notwithstanding the special verdict.

All of the above-mentioned points, as well as the point upon which the Circuit Court of Appeals decided this case, were strenuously pressed by respondent in the court below. It was and is the position of respondent that it is entitled to judgment on its motion for an instructed verdict and also on the special verdict of the jury. The Circuit Court of Appeals, without discussing the merits of the points specifically enumerated above, disposed of them in this language:

"We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

It is the contention of respondent that the questions referred to by the Circuit Court as not being discussed, but which were in issue in the case, present additional grounds for sustaining its judgment. Respondent is entitled to now advance those additional grounds which sustain the judgment of the Circuit Court and demonstrate its correctness, even though the opinion of the Circuit Court be construed as in effect deciding those points adversely to respondent.

—*Story Parchment Company* v. *Patterson Parchment Paper Company*, 282 U. S. 555, 75 L. Ed. 544.

Hereinafter under Section IV of this brief those additional grounds urged by respondent not adopted, and by inference rejected by the Circuit Court, as a basis for its judgment will be presented.

III. BRIEF OF ARGUMENT

Points of Reply to the Brief and Argument in Support of the Petition for Writ of Certiorari:

1.

The Circuit Court of Appeals correctly held that petitioner had no contractual cause of action, and the Court in so deciding did not go outside the issues or facts.

2.

The Circuit Court of Appeals correctly held petitioner to be without a statutory cause of action to recover the rates allegedly fixed by the Railroad Commission of Texas.

3.

The Circuit Court of Appeals correctly held that petitioner could not under the statute nor under the common law recover compensation in excess of the contractual compensation paid to and received by him in settlement of the services rendered.

4.

The Circuit Court of Appeals correctly held that the public policy of Texas did not require that petitioner be awarded a recovery in this case.

A. First Reply Point

The Circuit Court of Appeals correctly held that Petitioner had no contractual cause of action, and the Court in so deciding did not go outside the issues or facts.

Petitioner, as plaintiff in the District Court, brought suit upon the contract dated August 26, 1940, and attached the same as Exhibit "A" to his First Amended Complaint (R. 3). No reference was made to the supplemental agreement of July 31, 1941. In Paragraph V of the Complaint, Petitioner pleaded a right to recover in the alternative, either upon the alleged rates prescribed by the Railroad Commission or upon the contract.

Respondent, as defendant below, by paragraphs 14 and 15 of its First Amended Answer (R. 54) specifically pleaded that the contract sued upon did not constitute the entire agreement and that the supplemental agreement of July 31, 1941, was a part and parcel of the full contract of the parties. In detail the answer alleged the circumstances of the execution of the two agreements as constituting the contract of the parties.

Upon trial, evidence was introduced at length establishing beyond any question that the contract of the parties was evidenced by the two agreements and was intended to be so constituted from the outset (R. 184-213). In fact it was petitioner and his counsel who suggested and caused the agreement to be evidenced by the two agreements instead of one. [See the correspondence, Defendant's Exhibits 1 to 5 (R. 188-200) and the opinion of the Circuit

Court.] There was no denial or dispute of the evidence introduced upon this point. Neither petitioner nor counsel testified.

Thus, the repeated assertions in the brief of petitioner that the point decided by the Circuit Court that the *contract* of the parties was in fact constituted by *two* separate documents, was not an issue in the case and that the Circuit Court decided a point upon facts not in issue (brief of petitioner, p. 25), or not raised in the trial court (brief of petitioner, p. 26), are utterly unfounded.

The cases cited (brief of petitioner, pp. 26, 27) to support the contention that the Circuit Court was without jurisdiction or authority to determine this point are not applicable or pertinent.

Seely Oil & Gas Co. v. *R. R. C.*, 128 Fed. (2d) 334, (C. C. A. 5) was a suit in equity in which the trial court had failed and refused to make findings of fact as required by Rule 52, Rules of Civil Procedure. The Circuit Court simply held it was entitled to those findings by the trial court and refused to determine the facts or the case on its merits without such findings.

Cities Service Oil Co. v. *Dunlop*, 84 L. Ed. 196, 308 U. S. 209, states the rule that federal courts will follow local rules of property law.

Union Bleachery v. *U. S.*, 79 Fed. (2d) 549; *North American Accident Ins. Co.* v. *Anderson*, 100 Fed. (2d) 452, and *McGee* v. *Nee*, 113 Fed. (2d) 543, state the rule that in jury waived cases the Circuit Courts will not substi-

tute their conclusions upon the facts for those of the trial court unless the trial court's conclusions are clearly erroneous or not supported by substantial evidence.

Here the Circuit Court merely held that as a matter of law under the undisputed evidence, the contract of the parties was evidenced and constituted by the *two agreements*, and not one.

—10 Tex. Jur., p. 286, sec. 166.

Petitioner next asserts that the supplemental agreement was void as against public policy and thus he should be permitted to ignore that part of the contract and sue alone upon the original agreement. The vice of this argument is forcibly pointed out in the opinion of the Circuit Court of Appeals. That Court held from the undisputed evidence that there was but one contract that spoke the actual intent of the parties as to the compensation to be paid to petitioner, and that such intent was evidenced by the supplemental agreement under which all the services were performed; that the provisions of the supplemental agreement were a part and parcel of the *only contract existing between the parties*. The Court below also correctly held that a contract modified before performance, takes the place of the original contract and that all services in the case at bar were performed under the contract as constituted by the supplemental agreement. The evidence conclusively shows that at the very time the original contract was executed it was contemplated that a supplemental agreement would be entered into for the purpose

of amending the compensation provisions of the original contract before any services were performed thereunder. That is exactly what was done.

Furthermore, Section 13 of the original contract (the covenant relied upon) only required respondent to pay rates promulgated by the Railroad Commission "for the kind and character of services to be rendered hereunder" (R. 121). The evidence shows that Tariff 1-A of the Railroad Commission, sought here to be applied, *did not cover the kind and character of services rendered by petitioner,* since such services so rendered were not substantially the same services as those rendered by common carriers. The tariff itself described services dissimilar in many respects. The parties to the modified contract (entered into subsequent to the order of the Commission which petitioner now asserts applied the general tariff to the services here involved) expressly stipulated:

> "It is mutually understood and agreed that the Railroad Commission of Texas has not fixed any rates, charges or tariffs, and has not promulgated any rules and regulations respecting, for the kind and character of service to be rendered hereunder, * * *."

Under the stipulation of the parties and the evidence, no claim can be asserted under the covenant of the original contract *because the very standard fixed for determining the compensation to be paid thereunder failed.*

> —*Canadian National Ry. Co.* v. *George M. Jones Co.*, 27 Fed. (2d) 240, 242.

Even if the Railroad Commission tariffs did fix rates

for the kind and character of services here involved and the orders of the Commission made such tariffs applicable to the services rendered under the contract, it does not follow that the modified contract was void. Under Section 6-aa of the Texas Motor Carrier Act, Article 911-b, Texas Revised Civil Statutes, the Commission is *empowered to fix minimum rates for contract carriers operating in competition with common carriers.* Such contract carriers may charge any rate they wish and can agree upon with the shipper, which exceeds the minimum. The compensation specified in the modified contract might or might not exceed the minimum rates here relied upon, dependent upon costs, which included depreciation on equipment, damage claims and losses (absorbed by respondent), administration charges, and many other elements. It is quite conceivable that the compensation required to be paid petitioner could have exceeded the minimum rates relied upon. The modified contract was therefore not void. *Wright* v. *Donaubauer,* 154 S. W. (2d) 637; *Great Atlantic & Pacific Tea Co. v. Warren,* 44 S. W. (2d) 510. It required actual experience to determine if the compensation required to be and actually paid was less than the alleged minimum requirements of the Commission. It is clear that petitioner cannot here recover under the covenants contained in the contract.

But if the contract were void, it could not be segregated as to lawful and unlawful portions, the invalidity permeated the entire transaction and petitioner, the "prime

offender," being in *pari delicto* could not and should not recover under the contract which was fully executed long before suit was brought.

—*Wright* v. *Wight & Wight*, 229 S. W. 881.

In 10 Tex. Jur., p. 242, Sec. 140, it is stated:

> "Where an illegal contract has been fully executed, the courts will not interfere to litigate the claims of parties in *pari delicto* who have been injured thereby; neither a court of law nor a court of equity will aid either party to recover or reinvest himself with any title or interest vested in the other, but will leave them in the same position as to vested interests as they, by their own acts, have placed themselves. So money paid under an illegal contract may not be recovered back, where the contract has been fully executed and the parties are in *pari delicto*."

We respectfully submit that upon this point a simple question of law, having no importance to the public welfare or interest, was correctly decided, to-wit: That petitioner had no right to recover under the contract.

B. Reply Points Two, Three and Four Presented Together

2.

The Circuit Court of Appeals correctly held petitioner to be without a statutory cause of action to recover the rates allegedly fixed by the Railroad Commission of Texas.

3.

The Circuit Court of Appeals correctly held that petitioner could not under the statute, nor under the common law recover compensation in excess of the contractual compensation paid to and received by him in settlement of the services rendered.

4.

The Circuit Court of Appeals correctly held that the public policy of Texas did not require that petitioner be awarded a recovery in this case.

As pointed out by the Circuit Court of Appeals, petitioner was not content to stand solely upon his alleged contract. He claimed a right of recovery under the Texas statute and now also contends that he has a common law right to recover the rates and charges allegedly fixed by the Railroad Commission.

The underlying basis of the argument of petitioner and of the Attorney General is that public policy demands a recovery be allowed petitioner (not the State of Texas) in order to carry out the announced purpose of the Texas Motor Carrier Act (Art. 911b, *supra*), notwithstanding the absence of a provision in that Act affording a cause of action to contract carriers such as petitioner, to recover the alleged rates prescribed by the Commission, and not-

withstanding the absence of a provision in that Act making it the absolute duty of such contract carrier to collect such rates.

In brief, the stated purposes for the enactment of the Texas Motor Carrier Act are: (1) To preserve the highways of the State; (2) to protect the traveling public from injuries resulting from unrestricted use of the highways for business purposes; and (3) to eliminate discrimination in rates charged (Sec. 22b of the Act, *supra*).

While not specifically stated in the enactment itself, it is clear that another controlling purpose of the Act was to protect common carriers from unfair competition of contract carriers operating in competition with common carriers and performing substantially similar services (see the opinion of Circuit Court of Appeals in this case and the opinion of this Court in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288).

Respondent has at no time asserted the invalidity of of Texas Motor Carrier Act if properly construed. The decision by the Circuit Court in no manner adversely affects that Act. It is conceded that the State of Texas has constitutional authority to regulate and control, in any reasonable manner, motor transportation over the highways of that State. *Stephenson* v. *Binford*, *supra*, determined that question in 1932.

In the case at bar no contention has been made that the transportation services performed by petitioner created any undue burden upon the highways of the State or injuriously affected the use thereof by others. In fact, the Commission, in granting the permit, found to the contrary

and the evidence shows that all of the regulatory safety measures were made applicable to the services rendered. There is no claim that such regulatory measures were not observed.

Common carriers were not adversely affected in any respect by the transportation services rendered by petitioner or the charges made therefor. The evidence is undisputed that not one pound of tonnage was diverted from common carriers through the operations of petitioner. On the other hand, the evidence is conclusive that the class of commodities previously shipped by respondent over common carrier lines continued to be shipped over common carrier lines throughout the period of Steele's operations. [See the testimony of the witness, Frank Cross (R. 268 to 280), which disclosed in detail the facts as to the transportation of the products of respondent over a comprehensive period of fifty-four months, in relation to transportation by common carriers. This evidence was not disputed and conclusively established that the operations of petitioner did not adversely affect the business of any common carrier.] The jury found and the evidence showed that Steele did not operate in competition with common carriers over the highways of the State and that the services performed by him were not substantially the same as the services performed by common carriers. These findings were not set aside by the trial court but were allowed to stand (R. 104). The class of commodities handled and delivered by Steele was previously handled and delivered by respondent in its own trucks operated by its own drivers. During the Steele operation such commodities

were handled and delivered in the same trucks (sold by respondent to petitioner), and operated substantially by the same drivers, with the only difference being that previously the trucks were the property of respondent and the drivers its employees. Manifestly, the interest of common carriers was not adversely affected by the operation. In any event, they are not here complaining in any respect of the operations or the prices charged and received.

There was no discrimination in rates charged because, as stated by the Circuit Court of Appeals:

> "A contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He has no other customers in whose favor he could discriminate."

Petitioner was not a contract carrier hauling for numerous contractees or the public at large. He hauled only for General Mills and the permit under which he operated restrained him from hauling for others.

Moreover, it may be noted that as to the *contract motor carrier*, the prevention of discriminatory rates, in so far as the public is concerned, *was not intended or provided for*. The statute only provides that in cases where it is proper for the Railroad Commission to prescribe rates (i. e., for contract carriers in competition with common carriers), the Commission shall prescribe minimum rates which shall not be *less* than the rates prescribed for common carriers for substantially the same service.

This Court had occasion in *Stephenson* v. *Binford*,

supra, to note this fact. Speaking of the authority of the Railroad Commission to prescribe rates, it was there said:

> "*The authority is limited to the fixing of minimum rates.* The contract carrier may not charge *less* than the rates so fixed, *but is left free to charge as much more as he sees fit and can obtain.*" (p. 274, official report) (Emphasis ours).

A contract motor carrier in Texas, operating in competition with common carriers and under a prescribed minimum rate schedule, may discriminate at will among his customers so long as he does not adversely affect the common carrier by charging *less* than the prescribed rates.

Such discrimination could not be exercised by common carriers and the common carrier cases cited in support of requiring recovery because public policy denounces discrimination in rates, are not applicable here. The difference in policy between contract and common carriers is further illustrated by the fact that the contract carrier is not required by the law to file a copy of his contract of carriage nor is he required to file a schedule of rates as the common carrier is required to do. [Sec. 10 (3), Art. 911b, *supra*.]

In these vital respects the Texas Act differs from the federal enactment and the enactments of some other states from which authorities have been cited by petitioner and the Attorney General of Texas. In fact, the only regulation with respect to rates charged by contract carriers is found in Section 6aa of the Act (Article 911b, *supra*), wherein the Commission is vested with power to prescribe minimum rates for contract carriers *operating in competi-*

tion with common carriers, which minimum rates *shall not be less* than rates prescribed for *common carriers performing substantially the same service.* No finding was made by the Commission that the operations of Steele were or would be in competition with common carriers or that the services to be performed by him were substantially the same services as those performed by common carriers. The facts found by the Commission in its order are to the contrary. By evidence and express findings of the jury, both of these essential elements are here lacking.

It is inconceivable that the interest of the public is here involved. If there has been a violation of the Act, the remedies specifically given the State by the Act itself are amply sufficient to prevent recurring or future violations.

On the other hand, the Act discloses that the State is concerned in the rates charged by common carriers by motor, the same as it is concerned in the rates of common carriers by rail. Section 10 (3) of the Act requires a common carrier by motor to file with its application for a certificate of public convenience and necessity "a proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served." No similar requirement is made of contract carriers. There is no regulation of the Commission requiring any such schedule to be filed. It is true the Circuit Court of Appeals said it was appropriate and perhaps requisite that an applicant for a permit should exhibit his contract of carriage

under which he proposed to operate. The Court evidently prefaced this remark upon statements made in certain letters of petitioner's attorneys preceding the execution of the written agreements wherein statements are made that a custom prevailed that a contract carrier must submit his contract to the Commission showing the rates to be charged shall be such rates as prescribed by the Commission, but the law itself makes no such requirement.

Section 6a of the Act specifies in great detail the information necessary to be set forth in an application by a contract carrier for a permit. There is no requirement that a schedule of rates be filed or exhibited. There is no evidence of any regulation of the Commission to this effect. Certainly a prevailing custom or an unwritten requirement of the Commission in this respect could not act as a substitute for an enactment of the Legislature nor control the public policy of the State. The public policy of the State is defined by its authorized law-making body, not by custom or by an unauthorized requirement of a subordinate administrative board.

Regardless of the name designated, petitioner was nothing more than a private carrier hauling and performing services exclusively for respondent. Neither the public nor any other potential customer was entitled to demand his services. Common carriers were not interested in or prejudiced by the services performed by him because his operations were not in competition with or similar to the services performed by common carriers, and diverted no tonnage from such common carriers.

It therefore appears from an analysis of the evidence and of the law itself that this case differs in vital and material respects from the common carrier and contract carrier cases relied upon by petitioner. The case most strenuously stressed by both petitioner and the Attorney General of Texas is that of *Papetti* v. *Alicandro*, 58 N. E. (2d) 155 (Supreme Judicial District Court of Massachusetts).

An analysis of that case, however, clearly discloses distinguishing facts upon material and essential elements not present in the case at bar. The carrier there involved was operating part of the time in question as a contract carrier and part of the time as both a contract and common carrier. The carrier was required to and did file with the Department of Public Utilities a schedule or tariff of rates which were kept open for public inspection. Apparently the only essential difference between contract and common motor carriers in Massachusetts is that the contract carrier might choose his customers and operate under infrequent schedules, whereas the facilities of the common carrier were required to be kept open for all. It may be fairly inferred from the decision that the contract carrier in the Papetti Case was operating in competition with common carriers and performing substantially the same services. In any event, the Court made no distinction between a contract carrier and a common carrier and it is not apparent that there was any contention that the contract carrier was not operating in competition with common carriers. The gist of the opinion was a denunciation of

discrimination in rates in so far as shippers or the public in general was concerned. It has heretofore been demonstrated in the case at bar that this element of discrimination towards the public in the matter of rates is not involved in the case at bar. Furthermore, the Massachusetts law expressly required the contract carrier to collect the exact rate, no more and no less, specified in its filed schedule. As has heretofore been pointed out, the Texas Act does not require the contract carrier to collect a minimum rate and there is no prohibition against the charging of a rate higher than the minimum rate. In Texas the failure to observe the minimum rates, where authorized to be fixed, is simply made a penal offense and the State may institute suit for penalties against any person violating or procuring the violation of any order or rule of the Commission, or suits in equity may be brought on behalf of the State to enjoin such violations. Art. 1690b, Penal Code, Texas. It is significant that the Texas legislature failed to declare void contracts of a contract carrier providing for a rate less than prescribed by the Commission. The Papetti Case therefore is based upon distinguishing and material features not present in the case at bar in that the contract carrier in Massachusetts is placed in the same category as a common carrier in the matter of rates; is required to file with the Department of Public Utilities a schedule of rates; is required to collect the exact rate specified in the schedule filed; is subject to a legislative enactment prohibiting any discrimination in rates, and because the facts in that case indicated no difference in the services rendered by the contract carrier involved

from that of common carriers, the facts and the law involved clearly distinguish the Papetti Case from the case at bar.

The case of *Arctic Roofings* v. *Travers*, 32 Atl. (2d) 559 (Supreme Court of Delaware), involved rates of a common carrier by motor under the federal Motor Carrier Act and is clearly not in point. In all material respects the federal Motor Carrier Act is similar to the federal act relating to rail carriers. One of its prime purposes is to prevent direct or indirect discrimination in transportation rates. The rates of a common carrier transporting for the public were involved and upon the basis of holdings in rail cases it was held that a common carrier could not be estopped from collecting the rates prescribed by tariffs filed with the Interstate Commerce Commission.

Bottemueller v. *Wilson & Co.*, by the District Court for the Western District of Missouri, 57 Fed. Supp. 766, involved rates of a contract carrier operating under the federal Motor Carrier Act. It was held that the published rates filed by the carrier with the Commission superseded the contractual rate. The federal Motor Carrier Act, Title 49, Section 318, USCA, expressly requires a contract carrier operating under the federal Act to file with the Interstate Commerce Commission tariffs setting forth the rates and charges to be filed. The tariffs are required to be open for public inspection and the carrier is expressly required to charge and collect the rates specified in the tariff. Under the federal Act a contract carrier may and frequently does haul under contract for numerous shippers.

There was necessarily involved the controlling question of discrimination not here present. The situation in the Bottemueller Case is entirely different from that here involved.

There is no showing in the opinion in *Gardner* v. *Rich Mfg. Co.* (District Court of Appeals, California), 158 Pac. 23, that the contract carrier there concerned hauled exclusively for the same contractee. In fact, the contrary seems to appear. The question of discrimination was directly involved.

The Circuit Court of Appeals correctly held that cases involving freight rates of rail carriers — interstate under the federal Act and intrastate under the Texas Act — have no application here. The interest of the public in such rates is clear. The acts expressly required such rates to be observed by shipper and carrier. Under the Texas Act relating to rail carriers, the rates prescribed by the Commission are conclusive in all actions between shipper and carrier (Article 6452). Similar requirements are made in the federal Act relating to both carriers by rail and carriers by motor.

Discrimination is not here involved. Injurious competion to common carriers is not here involved. Safety of the highways is not here involved. Public policy of the State does not require petitioner to collect the alleged rates prescribed by the Railroad Commission in the interest of the public. If there has been a violation of any valid order of the Commission, certainly the remedies prescribed by the Act itself are amply sufficient to protect the State.

American National Insurance Co. v. *Tabor*, 230 S. W. 397, 399. We quote from the Tabor Case:

> "The statute does not denounce as void any policy which violates its terms. The expressly declared consequences of infractions of the statute appear to be ample to secure its obedient observance. The Supreme Court of the United States was of the opinion that, where this was true, it was the reasonable implication that the Legislature meant for only the statutory remedies to be applied, and it did not mean for courts to refuse to enforce contracts which were not declared void or unenforceable, though in contravention of the statute. *Harris* v. *Runnels*, 12 How. 79, 13 L. Ed. 901."

The Railroad Commission of Texas has not complained and is not here complaining. It must be presumed that the Commission is and has been fully informed of the compensation paid petitioner by respondent. Under Section 13b of the Act it is made the duty of the Commission to require reports to be filed by each motor carrier with the Commission of all operations under the Act. The Commission, under Section 14 of the Motor Carrier Act, is permitted to hear complaints, require production of records, and subpœna witnesses, to determine if any motor carrier is violating any provisions of the Act or any order of the Commission. No criminal complaints have been filed against petitioner. No suit for penalty has been filed. No equitable action to restrain violations of the Commission's order has been filed. All of these remedial rights are afforded the State under the Act. Article 1690b, Penal Code of Texas.

On the other hand, petitioner is here seeking to recover on the basis of his own wrong. The Attorney General of Texas appears as *amicus curiæ* for the purpose of assisting petitioner to recover for his own benefit, not for the use and benefit of the State. A denial of a recovery here is more conducive to discourage rather than encourage future violations of the Act and orders of the Commission. If a recovery is permitted then an unscrupulous contract carrier may, with impunity, solicit the business of a shipper upon representations that the services to be performed do not come under the purview of the rate making orders of the Commission, perform such services, collect the contractual rate; and after the termination of the agreement, change his front and demand the collection of the legal rate. This is precisely what was done here. It is fairly inferable from this record that had petitioner and his counsel not so urgently insisted that the Railroad Commission rates were not applicable and that the Commission was without power to prescribe rates for services such as those to be performed by petitioner, respondent would have continued, as it had done in the past, to transport the class of merchandise involved in its own trucks operated by its own drivers.

If a recovery is permitted here, an unscrupulous contract carrier may underbid a legitimate carrier and then nevertheless, after the contract is completed, recover the same charges as those bid by his competitor. On the other hand, if a recovery is denied, unscrupulous contract carriers will be discouraged from attempting such acts as it is manifest petitioner was guilty of committing in this

case. The public interest will be better subserved in denying a recovery here than by permitting it, for the very pointed reasons stated by one of the Texas appellate courts in the case of *Wright* v. *Wight & Wight*, 229 S. W. 881, from which we quote:

> "If it be conceded that the transaction in question violated the law mentioned (although we regard it as debatable), yet the appellees were parties thereto and transgressors of section 22 of the same act (article 4896), which made it unlawful for any agent 'to grant or contract for * * * any position or any valuable consideration or any inducement not specified in the policy contract of insurance.' Under section 22, any one so offending is declared guilty of unjust discrimination. So all of the parties are in *pari delicto* in an unlawful agreement which the pleading and agreed facts discloses has been fully executed. This being true, the courts will leave the parties where it finds them. They will extend no aid to recover back money paid under such an illegal and forbidden contract. *Seeligson* v. *Lewis*, 65 Tex. 217, 57 Am. Rep. 593; *Robertson* v. *Marsh*, 42 Tex. 151; *Glenn* v. *Matheus*, 44 Tex. 405."

In answer to the contention that public policy requires a recovery, the Court further said:

> "Appellees say, however, they should be allowed to recover because the public interest will be better promoted by granting than by denying them relief. It is true that as between parties in *pari delicto* relief will be granted if public policy demands it. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is,

served. The relief is granted to discourage such transactions by others.

"But, we think, the public interest will be just as well served by denying a recovery to the appellees as it would be by granting such recovery and imposing the loss upon the appellants. Insurance agents will be discouraged from making and carrying out discriminatory agreements when they know that the courts will not allow them to recover back money which they have expended in pursuance of such forbidden contracts."

Furthermore, it should be emphasized that the Circuit Court of Appeals did *not* hold, nor can it be possibly inferred that the Court held, that the rule of *pari delicto* could be asserted to bar recovery by a *common* carrier of lawfully prescribed tariffs.

The Texas cases of *Herrin Transportation Co.* v. *Marion*, 113 S. W. (2d) 291; *Central Freight Lines, Inc.*, v. *C. & S. Motor Freight Lines*, 125 S. W. (2d) 615; and *Railroad Commission of Texas, et al.* v. *Interstate Motor Freight Lines, Inc.*, 77 S. W. (2d) 1100; have no relation to the question here involved.

The Herrin Transportation Co. Case involved a *common carrier* operating under a certificate of convenience and necessity. The common carrier filed tariffs with the Railroad Commission and thereafter made a contract with the shipper to transport commodities at a lesser rate. The shipper undertook to enforce the transportation agreement and to recover damages because the rate charged by the carrier was in excess of the contract rate. The Court

merely held that the rates fixed by the Commission controlled and that damages could not be recovered against the common carrier growing out of a breach of a contract to transport the commodities at a rate less than the Commission rates.

Central Freight Lines, Inc., v. *C. & S. Motor Freight Lines, supra,* involved a controversy between common carriers. One sold its certificate of convenience and necessity to another under a verbal agreement that the purchaser should forego certain pickup privileges afforded under the certificate. The Railroad Commission approved the sale of the certificate but the restrictive agreement was not submitted to nor approved by the Commission. The seller undertook in an equitable action for injunction to enforce the parol agreement and enjoin the purchaser from exercising the pickup privileges. It was held that injunction would not lie to enforce an illegal executory contract.

In *Railroad Commission* v. *Interstate Motor Freight Lines, supra,* a contract motor carrier in a collateral proceeding assailed the action of the Railroad Commission in refusing it a permit to operate on a designated highway and sought an injunction preventing the Commission from interfering with the carrier's operation on the highway in question. Rates and charges were not involved. The Court properly held it was within the jurisdiction of the Commission to determine the highways over which the permit was applicable and that the action of the Commission could only be reviewed in a direct proceeding.

There is nothing in any of the Texas cases cited supporting either the position of petitioner or that of the Attorney General of Texas.

The Circuit Court noted many of the special conditions applying to and distinguishing this case by reason of the facts, and after considering the brief of the Attorney General submitted in support of the petition for rehearing below, pointed out that there was no question in this case of rate discrimination, in so far as the public was concerned and that there was no rate discrimination in so far as any common carrier was concerned nor any effect upon the business of common carriers because petitioner could only render service to respondent and could not solicit or engage in business generally.

Under these circumstances we submit the Circuit Court of Appeals was correct in holding there is no question of general public interest involved in this case and no public policy requiring that petitioner recover.

IV. ALTERNATE POINTS PRESENTING ADDITIONAL GROUNDS UPON WHICH THE JUDGMENT OF THE COURT BELOW MAY BE SUSTAINED

1.

The Railroad Commission of Texas did not undertake to apply minimum rates and charges to the transportation services here involved.

2.

If the orders of and permit issued by the Commission be construed as applying the rates set forth in the tariff relied upon by petitioner as minimum rates for the transportation services here involved, then such orders, permit and tariff to this extent are void on their faces because the Commission failed to find, as it was required to do, as a prerequisite to exercising limited and conditional ratemaking powers that the proposed operations of petitioner were in competition with the operations of common carriers over the highways of the state and that the services performed or to be performed by petitioner were substantially the same as those performed by common carriers.

3.

The Railroad Commission was without power to fix rates or charges for the transportation services rendered by petitioner because the evidence showed and the jury in the trial court found that the operations of petitioner over the highways of Texas were not in competition with common carriers and the services performed by him were not substantially the same as those performed by common carriers.

4.

If the laws of Texas be construed as authorizing the Railroad Commission to fix minimum rates and charges applicable to private contracts of carriage, even though the operations of private carriers are not in competition with common carriers over the public highways, and even

though the services performed by private contract carriers are not substantially the same as those performed by common carriers, then the legislative enactment and the orders and acts of the Commission thereunder, as attempted to be applied to respondent here, violate respondent's freedom of contract and deprive respondent of its property without due process of law, all in violation of the rights guaranteed respondent under the Fifth Amendment and Section I of the Fourteenth Amendment to the Constitution of the United States.

5.

If Article 911b, Revised Statutes of Texas, and the various sections thereof, be construed as authorizing the Commission to fix rates and charges to be observed as a minimum by private contract carriers, such as was petitioner, without at the same time requiring the Commission to find the existence of facts sufficient to authorize the Commission to fix minimum rates under Section 6-aa of the Statute, then so much of said legislative enactment of the State of Texas is violative of the Fourteenth Amendment to the Constitution of the United States.

Brief of Argument

All of the above propositions of law were urged by respondent in the trial court. The ruling of the trial court thereon was adverse to respondent. The ruling of the trial court thereon was properly assigned as error in the Court below by appropriate specifications of error. These speci-

fications of error were disposed of by the Court below in the following language:

> "We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

Had the Court below sustained the specifications involving the alternate points here presented, the same judgment as entered by that Court would have necessarily followed. The alternate points are not here presented to overthrow the judgment of the Court below but to sustain such judgment. They present additional grounds why such judgment should be sustained. Respondent has the right to here present such alternate points and if this Court finds any or all of such points to be well taken, the petition for *certiorari* should be dismissed or denied, even though this Court might conclude that the Court below improperly decided the law question upon which that Court based its judgment. *Langnes* v. *Green*, 282 U. S. 531, 535, 536, 537, 539, 75 L. Ed. 520; *Story Parchment Co.* v. *Patterson Parchment Paper Co., et al.*, 282 U. S. 555, 560; *Morley*

Construction Co. v. *Maryland Casualty Co.*; 300 U. S. 185, 190, 191, 81 L. Ed. 593.

For convenience and reference, further argument will be divided into sections, without reference, however, to the numbers assigned the different alternate points.

1. The alternate points do not present a collateral attack upon an order of a legally constituted state board entered pursuant to its lawful authority. They do not present a question of improper exercise of power so as to invoke the collateral attack rule such as was involved in *Texas Steel Co.* v. *Fort Worth & D. C. Ry. Co.*, 40 S. W. (2d) 78 (Tex. Com. App.), and *Alpha Petroleum Co.* v. *Terrell*, 59 S. W. (2d) 364 (Tex. Com. App.). On the other hand, the alternate points challenge the *inherent* power of the Railroad Commission of Texas to fix *any* rates or charges applicable to the transportation here involved, the Commission exercising under the Texas statute only conditional and limited ratemaking power, as distinguished from unconditional and general power in the premises. The power of a state commission must be measured by the legislative act conferring such power, whether the power sought to be exercised is legislative, judicial or administrative. The state agency must find, or at least it must otherwise appear in the record, that the prerequisite facts authorizing the exercise of conditional power exist before a court will enforce an order of the state commission. The existence of *power*, as distinguished from the method of *exercising* such power, is always the subject of judicial inquiry. The rule of verity has no application.

Cline v. *Niblo et al.*, 8 S. W. (2d) 633 (Tex. Sup. Ct.); *Cunningham* v. *Robison* (Sup. Ct.) 136 S. W. 441; *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616 (Tex. Com. App.); *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083; *Willis* v. *First Real Estate & Inv. Co. et al.*, 68 Fed. (2d) 671, 675; *Wichita R. R. & Light Co.* v. *Public Utilities Commission of Kansas*, 260 U. S. 48, 67 L. Ed. 124.

A commission or court must not only have jurisdiction over the parties and subject matter, but power to award the particular relief undertaken to be granted. *Harrison* v. *Barngrover*, 72 S. W. (2d) 971 (Texas C. C. A., writ denied, Texas Sup. Ct.); *Smith et al.* v. *Paschal et al.*, 1 S. W. (2d) 1086 (Tex. Com. App.); *Cooper* v. *Reynolds*, 10 Wall 308, 19 L. Ed. 931.

2. The validity or constitutionality of the Texas Motor Carrier Act as a whole, or any part thereof, is not here attacked, except and unless a construction be placed upon Section 6-aa thereof obviously different from the intended meaning of the Legislature of Texas. The alternate points do not in any respect require a holding by this Court different from the previous holding in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288. On the other hand, the holding of this Court in *Stephenson* v. *Binford*, *supra*, is sought here to be applied. The legality of the act of the Commission in issuing a permit to petitioner (except insofar as it is claimed that such permit fixes minimum rates to be charged) is not here questioned. It is conceded that a permit is required under the Act by every

motor carrier for hire, whether common carrier or private carrier. It is also conceded that the purpose of the Act under which the permit was granted was to protect the safety and convenience of the public in the use of the highways and to preserve the highways for the general welfare, and to protect common carriers against destructive, unfair and discriminatory competition by other motor carriers in the use of the highways. *Texas & Pacific Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927 (930, 931). To this end it was proper that the Commission require petitioner to apply for and obtain a permit, post a bond, not overload, and otherwise comply with the rules and regulations of the Commission designed to protect the public welfare. It is also conceded that had petitioner's operations been in competition with the operations of common carriers over the highways of the state, and had petitioner performed substantially the same services as common carriers, and had the Commission so found, the Commission could have fixed minimum rates to be observed by petitioner in order to protect the interests of common carriers. But this is a far cry from fixing rates covering private transportation over the public highways where the interests of common carriers are not concerned. The order of the Commission relied upon by opposing counsel expressly found that petitioner's use of the highways would not be injurious to the public and would not impair the public service of any authorized common carriers. Absent a legitimate public interest, the Legislature of Texas was not authorized to empower the Commission to fix rates for private transportation over the highways of the state nor was the Commission

authorized to exercise such power, if any was given. *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101.

The Legislature of Texas in enacting the present Motor Carrier Act in 1931, Article 911b, Revised Statutes of Texas, and the subsequent amendments thereto, recognized its limitations and applied separate rules and regulations for common and contract carriers. *Stephenson* v. *Binford*, 287 U. S. 251, 269, 77 L. Ed. 288. All private carriers are classified and included within the definition of contract carriers [*T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930] for the purpose of requiring such contract carriers to obtain a permit and to observe the rules and regulations of the Commission designed to protect the safety and convenience of the public in the use of the highways and to preserve the highways, but not for ratemaking purposes [*T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930].

The Texas Legislature only undertook to authorize the Commission to prescribe minimum rates, fares and charges for such contract carriers who operate in competition with common carriers, and then the minimum rates charged must not be lower than those prescribed for common carriers for substantially the same service. Section 6-aa, Article 911b, Revised Statutes of Texas; *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930;† *Stephenson* v. *Binford*, 287 U. S. 251, 273, 274, 77 L. Ed. 288.

†The Attorney General in his amicus curiae brief relies upon Texas & Pacific Ry. Co. v. Railroad Commission, supra, as announcing the public policy of the State with respect to motor carriers.

Speaking of the meaning of Section 6-aa, the Texas Court of Civil Appeals in *T. & P. Railway Co.* v. *Railroad Commission, supra* (930) said:

> "Contract carriers, a distinct and separate class from common carriers, must obtain a 'permit' to operate as such. Sec. 6 prescribes the requisites of an application therefor and Sub. (3) (c) of that Section forbids the granting of such permit if operation thereunder 'will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory.' And where authorized contract carriers operate in competition with common carriers the Commission must prescribe minimum rates, fares and charges for such services which must not be lower than those prescribed for common carriers for substantially the same service. See Sec. 6-aa."

Section 6-aa of the Act itself† is too clear and unambiguous to require construction. Obviously, it means what the Texas Court said it meant in *T. & P. Ry. Co.* v. *Railroad Commission, supra,* and what this Court said it meant in *Stephenson* v. *Binford, supra.* This section prescribes the power, sets forth the condition upon which it may be exercised, and the measure of its use. The Railroad Commission of Texas does not exercise constitutional power over motor carriers. It only exercises such power

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†"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service." Section 6-aa, Article 911b.

as the Legislature chose to delegate. The delegated power may be only exercised upon certain conditions. Minimum rates may not be fixed for all private or contract carriers. Those private carriers who do not operate in competition with common carriers over the highways of the state are beyond the ratemaking jurisdiction of the Commission; this because the operations of such private carriers do not compete with common carriers and therefore of necessity do not constitute unfair, discriminatory or destructive competition to common carriers such as the Legislature of Texas intended to prevent by the enactment of Section 6-aa. *T. & P. Ry. Co.* v. *Railroad Commission,* 138 S. W. (2d) 927, 930, 931.

The first enactment of the Texas Legislature in 1929 undertook to convert all private carriers into common carriers [*T. & P. Ry. Co.* v. *Railroad Commission,* 138 S. W. (2d) 927, 929 and 930] but in the 1931 enactment (911b) repealing the 1929 enactment, the Texas Legislature dealt separately with contract and common carriers and confined the ratemaking powers of the Commission over contract carriers to a narrow, limited and conditional field. This was doubtless due to the holdings of this Court in *Frost* v. *Railroad Commission,* 271 U. S. 583, 70 L. Ed. 1101, and *Smith* v. *Cahoon,* 283 U. S. 553, 75 L. Ed. 1264. On the other hand, the Legislature conferred, as it was authorized to do, unlimited and unconditional power upon the Commission to fix and regulate rates, charges and fares of common carriers in order to prevent discrimination. No discrimination can be involved, as held by the Court below, where a contract carrier hauls for and is

only authorized to haul for one contractee, as was the case of petitioner. Petitioner could have applied for a contract carrier's permit to haul for whomever he might wish and his services, had he been granted such a permit, would have been available to anyone he might choose. *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 931. But such an application was not made and such a permit was not granted. The order of the Commission granting the permit (R. 125-129) and the permit itself (R. 130-132) required petitioner to haul exclusively for respondent. If petitioner had applied for and obtained a permit to haul for anyone who would employ him, and so conducted his operations as to compete with common carriers over the highways of the state, the Commission, under the legislative enactment, would have been justified in fixing minimum rates, not less than those prescribed for common carriers for substantially the same services and required petitioner to observe such minimum rates. But such was not the case here.

There is no finding of the Commission that petitioner's proposed operations were or would be competitive with the operations of common carriers over the highways of the state or that the services performed or to be performed by him are or were substantially the same as those performed by common carriers. The permit is silent with respect to these elements (R. 130-132). The order finds facts inconsistent with the existence of competition or similarity of service (R. 124-129). The evidence upon the trial showed and the jury found that the operations of

petitioner were not in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same as those performed by common carriers (R. 105). The trial court did not set the special verdict of the jury aside. On the other hand, the trial court permitted the special verdict of the jury to stand and rendered judgment notwithstanding the verdict (R. 104-107).

3. The rates sought to be applied here are those prescribed in Texas Motor Freight Class and Commodity Tariff No. 1-A, which tariff was promulgated by the Commission primarily for common carriers. This tariff superseded Tariff No. 1. By general order entered on August 22, 1931 (following the promulgation of Tariff No. 1), the Commission directed that:

> "All Contract Motor Carriers as hereinbefore defined, be and they are hereby ordered to observe and apply as minimum temporarily until further orders of this Commission, * * * the rates, rating, rules and regulations heretofore prescribed or approved by this Commission for observance by Class 'A' Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended." (R. 134).

Subsequently the Railroad Commission of Texas adopted Motor Freight Class and Commodity Tariff No. 1-A, which became effective June 26, 1940. Section 3 of this tariff provides for the application of the rates therein set forth. Item 470 prescribes that the rates, rules and regulations in the tariff shall be observed "by Contract

Motor Carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary" (R. 136-137).

It is the position of counsel for petitioner that because the permit issued to Steele (R. 130-132) did not provide that the rates prescribed in Tariff 1-A should not apply, that such rates so prescribed automatically were applicable. It is also counsel's position that the reference contained in the order of the Commission (R. 127) as follows:

> "In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rate prescribed for common carrier motor carriers",

constitutes an order directly applying the tariff rates relied upon to the transportation services here involved. We submit these contentions are untenable. Tariff 1-A, prescribing rates for common carriers, is not applicable because the service performed by petitioner under the evidence and the special verdict was not substantially the same as the services performed by common carriers. Hence the tariff prescribes a rate for a different kind and character of service than that performed by petitioner. The Commission was without power under the legislative grant of authority to fix a blanket minimum rate applicable to all contract carriers. It was necessary for the Commission to consider each application for a permit on its own merits, to determine if the proposed operations thereunder were competitive with common carriers, and if the services to be performed were substantially the same as those per-

formed by common carriers. Therefore it must of necessity be presumed that the Commission, in the rules set forth in Item 470, Section 3, Tariff 1-A, of date June 26, 1940, intended that the tariff should be observed by contract carriers as a minimum when such contract carriers operated in competition with common carriers and performed substantially the same service. It cannot be assumed that the Commission intended to exceed its authorized statutory powers and violate statutory directions. The provision in the general order of August 22, 1931, cannot be construed as applying Tariff No. 1-A, effective June 26, 1940, to the operations here involved, because the order of August 22, 1931, related to Tariff No. 1, which was superseded by Tariff 1-A. The reference in the order (R. 127) is insufficient of itself to constitute an order making the tariff applicable. This reference must be considered in connection with the tariff itself and evidences only the attitude of the Commission if the operations become competitive with common carriers and the services performed are substantially the same as those performed by common carriers. In other words, the Commission pointed out a guide to petitioner in event the contingency mentioned should arise during the course of operations. The jury found neither contingency arose. It must be further remembered that Tariff 1-A, and the rules and regulations therein set forth, were in effect long before the execution of the original or supplemental agreement here involved. The permit was issued and the order of the Commission (R. 124-127) was entered prior to the execution of the supplemental agreement (R. 208-211). In

this contract, it was specifically agreed by the parties that the Railroad Commission of Texas had not fixed any rates, charges or tariffs for the kind and character of service to be rendered by petitioner for respondent. It is inconceivable how petitioner's counsel can now contend that the Railroad Commission of Texas did in fact fix rates when, subsequent to the permit and order now relied upon, and with full knowledge thereof, petitioner in writing agreed that no rates, charges or tariffs were prescribed for the services to be rendered by petitioner. It is submitted that the record in this case wholly fails to disclose that the tariff relied upon by petitioner was ever made applicable by the Commission to the transportation services involved. On the other hand, the Record affirmatively discloses to the contrary. Petitioner having been fully paid in accordance with the terms of his contract, the judgment of the Circuit Court of Appeals is correct.

4. If it be assumed that the Commission undertook to make Tariff 1-A applicable to the services performed by petitioner, the action of the Commission is void. The provision with respect to application of rates contained in Tariff 1-A, effective June 26, 1940, if construed as an order applying such tariff to the transportation services involved, is void on its face because the order was entered long before petitioner's application was filed and is a general order applicable to all contract carriers, without reference to the character of operations to be conducted or services to be performed. It was never contemplated by the Legislature of Texas under Article 911b that such an order would comply with the requirements of this Act. Further-

more, in no event is the tariff effective until the permit is issued, for the permit might well provide otherwise with respect to rates. If, as contended by petitioner, the failure of the permit to make other provisions with respect to rates and the reference to the tariff contained in the order constitute an effort on the part of the Commission to apply the tariff rates to the services to be performed by petitioner under the permit, the permit and the order are each void on their faces to the extent that either of them constitutes a ratemaking order because of the failure of the Commission to find there, or elsewhere in the Record, that the operations of petitioner under the permit are competitive or will be competitive with common carriers over the highways of the state, and that the services performed or to be performed by him will be substantially the same as those performed by common carriers. Where a commission exercises only limited and conditional power over a given subject, it is necessary that the Commission expressly find facts justifying the use of such power. The existence of jurisdictional facts is not presumed merely from the act itself. *Cunningham* v. *Robison*, 136 S. W. 441; *Geffert* v. *Yorktown Ind. School District*, 290 S. W. 1083; *Willis* v. *First Real Estate & Inv. Co. et al.*, 68 Fed. (2d) 671; *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633; *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446. Even if a commission exercises general and unconditional power, findings of fact justifying the exercise of such power must be made where the act authorizing the use of power requires such findings.

Wichita R. R. & Light Co. v. *Public Utilities Commission of Kansas*, 260 U. S. 48, 58, 59, 67 L. Ed. 124.

Article 911b, Section 12a, expressly requires the Commission, along with its order, to file a "concise written opinion, setting forth the facts and grounds for its action," in all instances where the application is contested. The Record conclusively discloses that the application of petitioner for a permit was a contested application. See statement from Record found in respondent's brief (Brief for Appellant in Court below, pages 36 to 39). So if upon the contested application the Commission did in fact undertake to fix rates, it was required under the express provisions of the Act to file findings justifying its action. The Commission did render an opinion and make findings (R. 125-130), but there is no finding justifying the Commission in fixing rates. On the other hand, the facts found are to the contrary. So, regardless of the nature of the power conferred upon the Commission, its ratemaking order (if construed as such) is void on its face because of the lack of necessary findings. Also see *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 932. But here it conclusively appears from the legislative enactment itself that the Commission exercised only conditional and limited power over contract carrier rates. Therefore, even without statutory requirements, it must appear from the order of the Commission that the prerequisite facts justifying ratemaking powers exist. Otherwise the order is void on its face.

5. In cases where a legislative agency is clothed with

limited legislative power and the order of the agency is silent with respect to the existence of facts justifying the use of the power, it is always a subject of judicial inquiry to determine if the prerequisite facts exist. Such an inquiry does not violate the collateral attack rule under the authorities previously cited. The trial court permitted evidence with respect to whether petitioner's operations were in competition with the operations of common carriers over the highways of the state and with respect to whether the services performed by petitioner were substantially the same as those performed by common carriers. The orders of and proceedings before the Commission introduced in evidence, construed most favorably to petitioner, were silent upon these two issues of fact inquired into by the trial court. The trial court submitted both issues of fact to the jury and the jury by special verdict found that petitioner's operations were not competitive with common carriers and that the services performed by him were not substantially similar to those performed by common carriers. The findings of the jury were not set aside by the trial court but were expressly allowed to stand as the special verdict of the jury. Judgment was rendered by the trial court in favor of petitioner, notwithstanding the verdict. This judgment was reversed by the Court below with instructions to the trial court to enter judgment for respondent. The special verdict of the jury and the Record in this case sustain the judgment of the Circuit Court of Appeals, for under the Record and the verdict of the jury on the fact issues the rate-making orders, if construed as such by the Commission,

were void for want of inherent power. *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633, by the Supreme Court of Texas, is in point. The Constitution of Texas confers upon the county courts exclusive original jurisdiction over estates of deceased persons. The effect of the constitutional provision is to confer upon county courts the general power to administer the probate law in accordance with legislative enactments. The homestead of a deceased person may not be sold to satisfy creditors of the deceased if a widow or minor child survives. In the cited case of *Cline* v. *Niblo*, the County Court, in the exercise of its probate jurisdiction, entered an order directing the sale of certain property for the purpose of satisfying claims of creditors which had been allowed by the Probate Court. The order of the Probate Court was silent with respect to whether the property was the homestead of the deceased and with respect to whether minor children survived. A direct appeal was not taken to the District Court as authorized by the Texas probate laws. The property was sold pursuant to the order of the Probate Court and purchased by Cline for value. Thereafter the purchaser's title was attacked in a separate proceeding by the heirs of the deceased. The question was squarely presented to the Supreme Court of Texas whether in a collateral proceeding the court was warranted in determining if the real estate was the homestead of the deceased, if minor children or an unmarried daughter survived the deceased, and if facts existed justifying the Probate Court to order the sale of the homestead. The Record in the Probate Court was

silent with respect to these elements. The Supreme Court answered this question in the following language:

> "If the probate records show that the court has attempted to exercise a power which it does not have, the judgment is void on its face, amounts to nothing, and may be disregarded in any forum. Freeman on Judgments (5th Ed.) pars. 382, 395. In cases, however, where the vice in the decree does not appear on its face, and the judgment does not show that the homestead question has been adjudicated, the courts permit the true facts to be shown and the invalidity of the decree to be established *aliunde* the record.
>
> "This is not so much a collateral attack on the judgment of the probate court as it is a declination on the part of the courts to conclusively presume that the homestead question has been determined in the probate proceedings, unless it so appears affirmatively from the record. If the record shows that the questions whether or not the property was homestead, or that the debts involved were chargeable against a homestead, then these issues, other requisites being present, are foreclosed, except upon direct attack upon justiciable grounds. Freeman on Judgments (5th Ed.), pars. 350, 372, 378, 379. But if these questions do not appear to have been adjudicated, the conclusive presumption of their involvement and determination does not obtain, and the real facts may be shown in another forum. This rule of law rests upon a sound basis."

The decision of the Supreme Court is grounded upon the rule that even though a court may have jurisdiction over the parties and the property, such court must also have the power to enter the kind of order, judgment or decree that was entered.

A very similar question was decided by the Commisssion of Appeals of Texas, acting for the Supreme Court, in the case of *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616, from which we quote:

> "It is true that our laws provide in certain instances that the orders and proceedings of county school boards can only be questioned by appeal to higher school authorities, but, when a school board acts without authority of law and contrary to express statute, and in such a manner that its act is void, then the courts of the land may be appealed to directly without first exhausting the remedy of appeal through the school authorities. *County School Trustees of Jackson County* v. *Edna Independent School District* (Tex. Com. App.), 34 S. W. (2d) 860; *Brockman* v. *Echols* (Tex. Civ. App.), 22 S. W. (2d) 686; *Collin County School Trustees* v. *Stiff* (Tex. Civ. App.) 190 S. W. 216 (writ ref.); *Freeport Independent School District* v. *Common School District*, 115 Tex. 133, 277 S. W. 97; *Henderson* v. *Miller* (Tex. Civ. App.) 286 S. W. 501 (writ ref.).
>
> *"In connection with the above, we hold that the county board of trustees is an administrative body with certain defined powers and duties. It can only exercise such powers and perform such duties as are expressly defined by statute, or necessarily implied therefrom. As long as such board acts within lawful limitations its judgment and discretion can only be questioned by appeal to higher school authorities, but, when it goes outside its statutory limitations and acts without authority of law, its acts are void and may be questioned in a court action without the formality of an appeal to the higher school authorities."*

The laws of Texas confer upon District Courts the power to remove disabilities of minority where the minor resides in the county of the District in which the petition is presented and where he is over 19 years of age. The jurisdiction of the District Court is thus limited and conditional. The Supreme Court of Texas, in *Cunningham* v. *Robison*, 136 S. W. 441, held that an order of the District Court undertaking to remove disabilities of a minor was void where it failed to appear from the order or from the record that the minor resided in the county where the petition was presented and was over 19 years of age. The Court held the order was subject to a collateral attack in another proceeding and was not (p. 441) entitled to the presumption of verity, especially as to the jurisdiction of the court, as would be the case where the function performed was that of the ordinary judicial powers of the court. The Commission of Appeals of Texas in another case, *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083, referring to the taxing power of a school district, held:

> "In a case like this of limited jurisdiction, where the right of the tribunal to proceed at all depends upon the existence of a given fact or the doing of a specific act, such fact or act is jurisdictional and precludes any further proceeding until it is shown to exist or to have been performed, as the case may be. The proceedings of such special tribunals, like inferior courts not of general jurisdiction, are not entitled to the presumptions of regularity usually attaching to official acts, until their jurisdiction — their right to act at all — is first affirmatively shown."

and also:

"It will not do to say that this precedent fact necessary to give jurisdiction may be shown by the subsequent acts of the tribunal in harmony with its existence, since this would be to attach to such subsequent proceedings the quality of official acts and the consequent force of evidence by way of raising a presumption of authority or power. *Such authority — in other words, jurisdiction — cannot be presumed from anything. It must be proved as any other fact is proved."*

Anderson, Clayton & Co. v. *Allred*, 62 S. W. (2d) 107 (Tex. Com. App.), involved the Texas Motor Carrier Act. The Railroad Commission was attempting to regulate trucks of Anderson, Clayton & Company under the provisions of the Act. It was held that the court in a collateral proceeding could determine if the operations of Anderson, Clayton & Company came within the legislative definition of contract carriers for hire so as to be subject to the provisions of the Texas Motor Carrier Act.

It has been held by this Court, in cases arising under the full faith and credit clause of the federal Constitution, that it is always proper for a court in another state to inquire into the power or jurisdiction of the court of a sister state to render the judgment sought to be enforced. *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538.

Section 20 of the Texas Motor Carrier Act, Article 911b, permitting appeals from orders of the Commission to the District Court of Travis County, does not preclude a court in another proceeding where the order of the Commission is sought to be enforced, to inquire into the inherent

power of the Commission to enter the order. Where, as here, the Commission exercises only limited and conditional power, and the record of the Commission was silent with respect to the existence of facts justifying the use of such power, it was proper for the trial court to inquire into the existence of such facts. The trial court did so, submitted the issues to the jury, and the jury found the facts did not exist. The attempted ratemaking orders therefore cannot be enforced and the judgment entered by the Court below was proper.

6. Petitioner and the Attorney General of Texas undertake to apply the doctrine laid down by this Court in *Pierce Oil Co.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855; *Shepard* v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115; and *St. Louis Malleable Casting Co.* v. *Pendergrast Construction Co.*, 260 U. S. 469, 67 L. Ed. 351 It is asserted that respondent, a foreign corporation, came into Texas, charged with the knowledge of the Texas laws and the orders of the Railroad Commission, "in the use by respondent of a Texas contract carrier permittee performing transportation services for respondent only." (Attorney General brief, p. 38.) The doctrine has no application here. Respondent came to Texas long before the arrangement with petitioner here involved was made and long before petitioner obtained a permit to operate as a contract carrier and before the orders relied on by petitioner were entered. Respondent was not a party to the proceedings before the Commission. It did not apply for and did not receive any benefits from the Commission. Respondent

was not issued and has never held a contract carrier's permit. The transportation involved here was not performed under any permit issued to respondent. Petitioner's application to the Railroad Commission was for a permit; not to have rates fixed for the services to be performed. Respondent was not a party to and had no knowledge of the contents of petitioner's application for a permit. The applicable law of Texas, Article 911b, Section 6a, did not require petitioner to file with the Commission a schedule of rates to be charged by him. Respondent was not charged with notice of the gratuitous statement in petitioner's application for a permit that petitioner expected to charge the Railroad Commission rates, particularly since the law did not require such statement to be made. The contract of carriage was entered into long after petitioner's application containing such statement was filed. Respondent knew, or was charged with knowledge of, the fact that the Commission could not fix minimum rates in the absence of competition between the contract carrier and common carriers over the highways of Texas, and in the absence of substantial similarity of service between the contract carrier and common carriers. Respondent knew and the parties agreed that neither of these facts existed. Respondent did not know at the time it contracted with petitioner and does not now believe that the Railroad Commission of Texas ever undertook to apply rates to the transportation services here involved. The parties hereto expressly agreed that no such rates were fixed by the Commission. The rule announced in the cited cases has no application.

The mere fact that respondent holds a permit to transact business in the State of Texas does not deprive it of the right to complain of an unlawful order of the Commission or of an unconstitutional act of the State Legislature. *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532, 533, 66 L. Ed. 352; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 544, 66 L. Ed. 1044. The Legislature has not undertaken to impose any such penalty. Furthermore, the Legislature of Texas cannot deprive a court of the United States of its lawful jurisdiction. *Farmers Loan Co.* v. *Reagan*, 154 U. S. 362, 38 L. Ed. 1014; *Terral* v. *Burke Construction Co.*, *supra*.

7. If in fact the Legislature of Texas did confer upon the Railroad Commission general power to fix rates and charges of private carriers (such as was petitioner) who did not operate in competition with common carriers and who did not perform substantially the same services as common carriers, and to require respondent to observe such rates and deprive respondent from entering into a private contract of carriage with petitioner, then the Texas law and the attempted acts of the Commission thereunder are unconstitutional and void under the Fifth and Fourteenth Amendments to the national Constitution, because respondent's freedom of contract is violated and its property is taken without due process of law. *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101. The doctrine announced in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288, does not save the act as thus applied from the constitutional

objections here presented because this Court, in *Stephenson* v. *Binford*, assumed that the Commission was only authorized to fix rates for private carriers where the private carriers operated in competition with and performed substantially the same service as common carriers.

8. If the Texas statutes are construed as not requiring the Commission to find the existence of facts prerequisite to the conditional power to fix rates of private carriers, the Texas Act also violates due process of the Federal Constitution. *Panama Refining Co.* v. [illegible], 293 U. S. 388, 79 L. Ed. 446.

CONCLUSION

It is respectfully submitted that the public interest is not involved or adversely affected by the decision of the Court below. The judgment of the Court below was correct. If, as assumed by that Court, the Railroad Commission did fix rates and its acts were lawful under the Texas Act and that the Act is not unconstitutional, then the holding of that Court on the point of law discussed in the opinion is correct. If, on the other hand, the alternate points, or any of them, presented in this reply, are well taken, the correct judgment was entered by the Court below regardless of whether that Court properly decided the legal question made the basis of the judgment.

We agree with this statement found in the opinion of the Court below:

"Surely a Daniel has come to judgment and from what a remarkable source!"

A judgment contrary to that entered by the Court below would be adverse to the public policy of Texas and shocking to morals and good conscience. It is therefore respectfully prayed that the petition for writ of *certiorari* be dismissed or refused.

Respectfully submitted,

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No. 79

In the

Supreme Court of the United States

OCTOBER TERM, 1946

LEO H. STEELE,
Petitioner,

VERSUS

GENERAL MILLS, INC.,
Respondent.

BRIEF OF RESPONDENT ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

GENERAL MILLS, INC., *Respondent.*

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November, 1946.

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No. 79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

LEO H. STEELE,
Petitioner,

VERSUS

GENERAL MILLS, INC.,
Respondent.

BRIEF OF RESPONDENT ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT

Respondent takes issue with petitioner's statement that the trial court decided every issue favorably to petitioner. There were only two issues of fact presented by the evidence, both of which were submitted to a jury in the trial court, and the jury's special verdict on these two issues of fact was in all respects favorable to respondent (R. 62 and 63). The trial court did not set aside the jury's special verdict but allowed the jury's special verdict to

stand (R. 80, 81 and 291) and rendered judgment notwithstanding the verdict. The holding of the trial court was that petitioner was entitled to recover as a matter of law, notwithstanding the facts found by the jury favorably to respondent (R. 279-293). The issues before the trial court and before the Fifth Circuit Court of Appeals were:

I. Whether under the evidence in the case and the facts as found by the jury the tariffs of the Railroad Commission of Texas relied upon by petitioner were applicable to the transportation services performed by him.

II. Whether the order of the Commission and the permit, to the extent that such order and permit might be construed as an attempt on the part of the Commission to apply the Commission's tariffs here involved to the transportation services to be performed by petitioner, were void upon their faces.

III. Whether the orders of the Commission and permit issued by it under the facts and findings of the jury were void as rate making orders.

IV. Whether under the Texas Motor Carrier Act the Railroad Commission had power or jurisdiction over petitioner's charges for transportation services performed for respondent.

V. If in fact the Legislature of Texas did confer power upon the Commission to fix compensation to be charged by petitioner to respondent, and if in fact the Commission undertook to exercise such power, whether the legislative source of power and the act of the Commission itself were in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

VI. Even if the Commission had the power to fix rates for the transportation services performed by petitioner, and did so, and the legislative grant of power to the Commission and the acts of the Commission thereunder were not violative of the Federal Constitution, whether petitioner, under the facts in this case, could recover the difference between the contractual consideration paid to and accepted by him and the rate of compensation fixed by the Commission.

VII. Whether petitioner's cause of action, if any he had, or any part thereof, was barred by the Texas two-year Statute of Limitation.

There were before the Fifth Circuit Court of Appeals certain other specifications complaining of rulings of the trial court on questions of law, which specifications were not decided by the court below and which are referred to in Section Four of this brief.

Points I to V above noted were inferentially decided adversely to respondent by the court below without discussion (R. 312). The court below found favorably to respondent on Point VI (majority opinion, Circuit Court of Appeals, Fifth Circuit, R. 308-318, and opinion on rehearing, same court, R. 344-346). Point VII was not considered by the court below. The court below held that the Texas statute relied upon by petitioner was not enacted for his protection and that he had no cause of action either under the contract sued upon or under the statute. The judgment of the Circuit Court of Appeals reversed the judgment of the trial court and remanded the case with instructions to the trial court to enter judgment for respondent.

Petitioner has divided his brief into two sections. Section One deals with the holdings of the Fifth Circuit Court of Appeals adverse to him. Section Two, which he improperly designates as "Relating to Immaterial Issues", deals with Points I to V and Point VII noted above. Point VI (the ground upon which the court below predicated its judgment) becomes immaterial if respondent's position is correct with respect to any of Points I to V. We therefore take the liberty of presenting the points involved in their logical order rather than following the order of petitioner's presentation.

NATURE OF THE CASE

Petitioner's statement of the nature of the case is incomplete and in some respects incorrect. The nature of the case is correctly stated in the majority opinion of the Fifth Circuit Court of Appeals (R. 303-318). In order to clearly present our position to this Court we will here make a more complete statement of the nature of the case. There was no dispute in the facts except perhaps with respect to the two issues made the basis of the jury's special verdict in the trial court. Neither petitioner nor his attorneys, whose conduct is made the basis of the findings of the court below, testified at the trial, although present.

At page 4 of petitioner's brief it is stated that petitioner, in response to one of the requirements of the Commission, made the following statement in his application for a permit:

"Applicant proposes that the tariff to be charged

for the services proposed to be rendered will be that as promulgated by the Railroad Commission of Texas."

There is no evidence that this statement was made pursuant to any requirement of the Commission. Furthermore, there is no evidence that respondent ever saw petitioner's application for a permit containing this statement. On the other hand, the evidence affirmatively shows that respondent made no application for a permit to have petitioner transport goods for it; that it knew nothing of the contents of petitioner's application and did not join therein (R. 141 and 142). The further statement is made at page 4 of petitioner's brief that respondent, through its Traffic Manager, Mr. McCraney, appeared and testified under oath before the Commission concerning the proposed operation. The Record does not support this statement. Petitioner made substantially this averment in Paragraph V of his complaint (R. 5) and respondent did admit in its answer that Mr. McCraney testified as a witness before the Commission but otherwise denied petitioner's averment in the respects stated (R. 43).

Respondent's answer to the demand for admissions only went so far as to admit that Mr. McCraney testified as a witness before the Commission (R. 110 and 111). There is no evidence whatsoever that respondent appeared at the hearing before the Commission in support of petitioner's application or that McCraney was a representative of respondent at the hearing. Insofar as the evidence is concerned, Mr. McCraney was in attendance at the hearing as a witness and not in a representative capacity for respondent. There is not one iota of evidence with respect

to the testimony given by Mr. McCraney. Petitioner and his attorneys doubtless could have given testimony upon this subject at the trial had they desired. On the contrary, in face of the denials in respondent's answer, they remained silent.

Petitioner's statement that on August 26, 1940, petitioner and respondent entered into a contract by the terms of which it was agreed that petitioner would charge and respondent would pay the rates as fixed by the Railroad Commission of Texas, and subsequently, on July 31, 1941, entered into a second contract providing that respondent would pay and petitioner would collect a lesser rate than the one prescribed by the Commission, is not a correct statement of the facts and is fully answered by the opinion of the court below. That court, from the undisputed evidence, after referring to the two instruments, made this finding:

> "There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed. Appellee says that this provision in the supplemental contract for the payment of Steele is void, and he ignores the fact that it is a part and parcel of the only contract on which he can declare" (R. 312).

Although the so-called first contract bears date August 26, 1940, it was not executed and delivered until April 17, 1941 (R. 152, 153), which was long subsequent to the date petitioner's application for a permit was filed with the Commission and hearings were held thereon (R. 94). The supplemental agreement (which the parties contemplated

from the inception would be entered into) provided generally that respondent would pay petitioner, for the transportation services to be performed by petitioner, the latter's cost, plus 10%, plus certain additional remuneration therein provided for. It is readily apparent from this statement that the amount required to be paid petitioner under the terms of the agreement could have exceeded the rates fixed in the tariff upon which petitioner now relies. At the time the supplemental agreement was entered into (R. 155-159) the situation with respect to the applicability of the Commission's tariff was the same as it was at the time this case was tried in the trial court and at the present time. The tariffs and order of the Commission now relied on by petitioner were then in effect. The permit had been granted. Nevertheless and notwithstanding petitioner's present contention, it was expressly stated in the supplemental agreement executed by both of the parties in part as follows (R. 155, 156):

> "Whereas, the parties hereto entered into a certain transportation contract under date of August 26th, 1940, as above referred to, and by the terms of paragraph 13 thereof, it was mutually agreed that the compensation to be paid for the services thereunder to be rendered by first party, or the rates to be charged by first party and paid by second party should be such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas and in conformity with the rules and regulations then in existence or that might thereafter be promulgated by said Commission for the kind and character of services to be rendered thereunder; and,
>
> "Whereas, the Railroad Commission of the State of Texas has not fixed rates, charges or tariffs for the

kind and character of services to be rendered under said contract; and,

"Whereas, the parties desire to specifically agree upon the compensation to be paid to first party by second party for the services rendered or to be rendered upon said contract, and, to supplement and amend said contract as set forth herein:

"Now, therefore, premises considered and for the considerations contained in the original contract of August 26th, 1940, and herein contained, it is mutually agreed as follows, to-wit:

"1. Paragraph 13 of said contract of August 26th, 1940, is supplemented and amended to read as follows, to-wit:

"'13. It is mutually understood and agreed that the Railroad Commission of the State of Texas has not fixed any rates, charges or tariffs, and has not promulgated any rules and regulations respecting, for the kind and character of service to be rendered hereunder, and that the cost to second party to be paid to first party for the services rendered or to be rendered under this contract shall be calculated upon a cost-plus basis as hereinafter set forth. * * *"

It is true that the trial court did peremptorily instruct the jury to render a general verdict in petitioner's favor (R. 279-293) but this was after the jury's special verdict favorable to respondent was returned and filed (R. 270, 80, 81) and after the court expressly refused to set aside the jury's special verdict (R. 290, 291). On the other hand, the jury's answers to the special interrogatories submitted by the court were received, filed and allowed to stand as the jury's special verdict in the case (R. 80-81). Judgment was rendered notwithstanding such verdict. The trial

court did file findings of fact and conclusions of law over respondent's seasonable objections (R. 76-79). Respondent complained of the trial court's action in making findings of facts by appropriate specifications of error in the court below (see Specifications V and VI, page 17, appellant's brief, Circuit Court of Appeals, and argument thereon, pages 79 and 80). In cases tried before a court without a jury it is the duty of the trial court to file findings of fact and conclusions of law under Rule 52, Rules of Civil Procedure. In cases submitted to a jury on special issues the court may make findings on an omitted issue (Rule 49), but this seems to apply only where a judgment is rendered on the special verdict. In any event the right to make findings under Rule 49 is limited to omitted issues. It was improper for the trial court to make findings of fact and we respectfully submit that such findings should not be considered for any purpose.

ADDITIONAL STATEMENT OF CONTROLLING FACTS

A. Background of contract and performance thereof.

In the year 1940 and for some time prior thereto the petitioner, Steele, was an employee of respondent, General Mills, Inc., in charge of the transportation by truck of certain products of respondent from its Oklahoma City plant, where petitioner was stationed. Respondent entered into a contract with an independent contractor at its Oklahoma City plant to haul a certain class of its products from the plant direct to its customers instead of making such deliveries direct in trucks of respondent, as had

previously been the custom. The new transportation arrangement at Oklahoma City was on a cost plus basis; that is, the contractor received his costs, plus 10% as compensation for hauling and delivering the products. Respondent thought it desirable to make a similar arrangement at Wichita Falls and tentative plans were worked out with petitioner whereby he would leave the employ of respondent, move to Wichita Falls and enter into a transportation arrangement similar to the arrangement then in effect at Oklahoma City. Preparatory to putting the agreement into effect, petitioner did move to Wichita Falls, Texas, and for a time superintended the transportation and delivery by truck of the products of respondent from its Wichita Falls plant. While petitioner was at Wichita Falls, and prior to the commencement of the arrangement here involved, respondent forwarded to him a contract to be executed similar to the contract in effect at Oklahoma City, expressly providing that petitioner would be paid for his services the actual cost thereof, plus 10% and plus certain additional administrative charges. It was also contemplated that respondent would sell petitioner the trucks then in use by it and these trucks, suitably adapted for that purpose, would be used by petitioner in transporting respondent's products (R. 135-138, 159). Petitioner thereupon submitted the proposed contract to his attorneys in Fort Worth (the same attorneys now representing him in this litigation) and Mr. Morgan, one of his attorneys, wrote him on February 28, 1941, as follows (R. 140-141):

"Dear Mr. Steele:

"Since you left this morning, I have again carefully

considered the proposed contract to be entered into between you and General Mills.

"Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

" 'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

"Very truly yours,

"(Sgd.) CECIL A. MORGAN.

"Mr. Steele:

"P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

"Very truly yours,

"(Sgd.) CECIL A. MORGAN.

"Special delivery."

A copy of this letter was delivered by petitioner to Mr. Colfix, the division comptroller of respondent, at Oklahoma City (R. 138). After correspondence between the parties, Mr. Christopher, a member of the firm representing petitioner, wrote Mr. Colfix, of respondent, quoting Section 6aa of Article 911b, Texas Civil Statutes, and concluded his letter with the following statement:

> "I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or to yourself with reference to this matter the next time Mr. Steele is in the office" (R. 145).

A conference was arranged in the early part of April, 1941, at which time there were present Colfix, petitioner, and Mr. Christopher, one of the attorneys for petitioner. Colfix, at the trial of the case, testified without contradiction as follows (R. 147-148):

> "I indicated to these gentlemen that the form of contract that they proposed to us was entirely different than the understanding that Mr. Steele and our company had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally exe-

cute a supplemental contract for the type of service that would be rendered by Steele for us.

"I indicated to these gentlemen that our company had a great deal of confidence in Mr. Steele, and that we never expected to have any difficulty with Mr. Steele in this type of contract, but I did wonder if there was any possibility that some later Court ruling or interpretation being made that the Railroad Rates could apply to the contract that we had, and they informed me again that the contract was a legal contract, that it was an agreement between two parties and that the Railroad rates for common carriers would not apply to our operation and that we would have nothing to worry about.

"Mr. McKnight: You say the contract was a legal contract, to what contract do you refer?

A. I refer to the original contract as suggested by them, supported with a supplemental contract for charges. You see the original contract had no basis for charges under the theory that the Railroad Rates did not apply, and we must have charges, between individuals.

Q. And that was what you expected to put in your supplemental contract, the agreement with respect to rates?

A. That is correct.

Q. That was to what your conversation was directed?

A. That's correct."

And further (R. 197):

Q. "All right, I will ask you this question, Mr. Colfix, in this conversation you had with Mr. Christopher and Mr. Steele, in the office of Mr. Christopher in Ft. Worth on April 11, 1941, I believe

it was, according to the date of this letter, was there any suggestion made by Mr. Christopher at that meeting that this supplemental contract be submitted to the Railroad Commission?

A. No, no such suggestion was made."

Neither petitioner nor his attorney, Mr. Christopher, testified at the trial of the case, though both were present. The testimony of the witness, Colfix, is undisputed.

Following this conference Mr. Christopher wrote and forwarded to Colfix the following letter (R. 149-151):

"This is in reference to and confirms our conversation of this morning while you and Mr. Steele were in the office. It will also supplement our letter to you of April 3rd.

"It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges as have been prescribed by the Railroad Commission of Texas, that being under the provisions of the statute of, as quoted to you in my letter of April 3rd, copy of which is also enclosed herewith.

"In my letter to you of April 3rd, I pointed out the fact that the Railroad Commission has attempted to prescribe rates for contract carriers, that being contained in Railroad Commission of Texas Tariff Circular No. 2-A, which fixes a minimum rate for contract carriers only, at the rates prescribed for common carriers.

"You will especially observe the language of the statute which contains the following language:

" 'The Commission shall prescribe minimum rates, fares and charges to be collected by such contract car-

riers which shall not be less than the rates prescribed for common carriers for substantially the same service.'

"Of course, you have not had any experience with the service of contract carriers, but you do anticipate that the service to be rendered under the contract which you propose to make will not be a service which will be in any respect 'substantially the same service' as is rendered by common carriers, for the simple reason that this contract carrier, if you enter into a contract and if the permit is approved, will devote all of its time and attention to you exclusively and to no other member of the general public. The trucks which he operates will be dedicated to your service alone and will not operate in the service of any other member of the general public. He will be subject to your direction and command at all times the same as his trucks will be and will have no regular schedules and no regular routes as common carriers must have, his trucks will be ready to operate from Wichita Falls or from other points at any hour of the day or night which you may direct in order to render the service which you require and will operate over most direct routes to any destination to which your commodity will move without awaiting scheduled departure times and without the interlining of the shipments at connecting carrier points, as well as many other services which cannot at all be rendered by common carriers.

"It may not, therefore, be said that the service which will be rendered by this contract carrier can never in any event be a substantially similar service to that rendered by common carriers.

"The Railroad Commission of Texas, in the almost ten years now since the Truck Law was passed as it now exists has not at any time undertaken an investigation of the services rendered by contract carriers

nor have they undertaken any investigation of the cost of such service or any of the other factors which would enter into rate making. Of course, you do not know about these costs or advantages either, because you have not operated with the benefit of a contract carrier. Just what operating cost would be and what particular advantages will be worth then as may be anticipated cannot now be determined by you without some experience.

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supplemental contract be entered into based upon the service rendered. That such an arrangement will not be violative of the provision of the statute quoted in my letter of April 3rd, for the very simple reason that the two services, that is, contract and common carrier service cannot be compared so that it can never be said that the two services rendered could be 'substantially the same.'

"We have given considerable thought to various other elements entering into consideration of whether or not you should make this contract as suggested by yourself this morning, that is various contingencies that might arise following the execution of the contract and the institution of the operation. We think, however, that you fully understood our position with reference to those matters and I do not believe that any complication could possibly arise on account of any of those things, and since it is my impression that you

wished our opinion with reference to the particular section of the statute involved along we do not assume that it is necessary for us to discuss those matters.

"Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and the service actually rendered in comparison to service of common carriers. To me, however, it is simply a reasonable business risk, if it is a risk, which you can afford to take.

"Very truly yours,

"tsc/ds "T. S. CHRISTOPHER."

Following receipt of this letter, one of the attorneys for respondent in Oklahoma City conferred with petitioner's attorney over the telephone and thereafter an amendment was made to paragraph 13 as proposed by petitioner's attorneys so as to add the following phrase:

"For the kind and character of service to be rendered hereunder" (R. 152).

This language is found in the contract as executed (R. 91). Thereafter Colfix wrote Mr. Christopher a letter of date April 17, 1941, as follows (R. 152-153):

"Yesterday you discussed with Mr. France a change in paragraph 13 of the contract between Mr. Steele and General Mills. As a result of this conversation you both agreed to add the following phrase to the end of Paragraph 13, 'for the kind and character of service to be rendered hereunder.' We have made this change and have executed two copies of the contract which are being sent to you at this time.

"After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills.

"I did not indicate the date of execution no Page 1 and page 5, as I thought it might make some difference as to whether or not the present date was indicated or whether you wanted to go back to the time you started your hearings with Railroad and Warehouse Commission. Will you please investigate this date and advise me in order that I might place it on my copy."

The date, August 26, 1940, was inserted in the contract, although it was not actually agreed upon and executed until after April 17, 1941 (R. 153). Following the letter to Mr. Christopher last referred to, a supplemental agreement was drawn up and agreed to between the parties (R. 154) and is found in the Record at pages 155-159. It was delivered to petitioner, Steele, personally at Oklahoma City or mailed to him at Wichita Falls (R. 154). He executed the agreement and returned it to Colfix (R. 154). The supplemental agreement is dated July 31, 1941, and amends Paragraph 13 of the original agreement. Although the tariff relied upon by petitioner was in effect at the time, it is recited in the supplemental agreement that the Railroad Commission of Texas had not fixed any "rates, charges or tariffs for the kind and character of services to be rendered under said contract" and the parties thereupon set forth the amount of compensation to be paid petitioner by respondent. The compensation fixed was that originally agreed upon and set forth in the initial draft of the con-

tract mailed to petitioner Steele (R. 155). This compensation generally was based upon petitioner's costs, plus 10%, plus certain administrative charges, and evidenced the real agreement between the parties from the inception of the negotiations. No transportation services were performed by petitioner until after the execution of the supplemental agreement. It was in full effect during all the times involved. Petitioner's operations started on August 1, 1941, and continued through October 31, 1943, a period of twenty-seven months. Each month petitioner billed respondent for services strictly in accordance with the terms of the supplemental agreement and was paid on that basis currently (R. 160). In this connection the witness, Colfix, testified, without contradiction (R. 162):

Q. "Now, during the entire period of this operation, before its termination, some twenty-seven months after it started, did Mr. Steele ever make any claim to you that he was entitled to be paid on the basis of the Railroad Commission's tariff rates?

A. No, sir.

Q. Was there any such claim as that ever presented to you until after the termination of this agreement?

A. None."

B. Nature of services performed by petitioner.

There were submitted to the jury in the trial court two issues of fact. These issues and the jury's answers thereto, constituting their special verdict, were as follows:

"No. 1.

"Do you find from a preponderance of the evidence in this case that the operations of plaintiff Steele under his contract with defendant were in competition with common carriers over the highways of Texas? Answer 'yes' or 'no'.

"Answer: 'No'.

"(Signed) Mickey Maguire, Foreman."

"Do you find from the evidence in this case that plaintiff Steele rendered substantially the same service as that rendered by common carriers, during the time, and in the area of transportation here involved? Answer 'yes' or 'no'.

"Answer: 'No'.

"(Signed) Mickey Maguire, Foreman" (R. 80).

The evidence adduced at the trial amply supports the special verdict, which the trial court permitted to stand. Petitioner hauled for respondent alone in specially designed trucks formerly used by respondent for this purpose (R. 159). None of the tonnage previously handled by common carriers was diverted to petitioner's trucks (R. 137). Respondent required a specialized type of delivery service, due to competitive conditions, which was not available from common carriers (R. 162, 163). It was not customary for other milling companies in the area to use common carriers in the distribution of their products in the area surrounding their milling plants (R. 164). Many of respondent's customers to whom deliveries were required to be made were not at locations where they could be

served at all, or at least as quickly with common carrier service (R. 165). A special type of truck bed was required for the purpose of transporting respondent's commodities (R. 165). It was necessary that respondent's products be delivered into its customers' places of business and stacked for display. This service was not provided by common carriers (R. 166). It was also necessary for the truck drivers to pick up rejected merchandise and return it to respondent's mill (R. 167). Generally the trucks left respondent's plant loaded with orders for a number of customers to be dropped along the route of delivery (R. 167). The trucks would not travel on any given route but would go where deliveries were necessary (R. 167, 168). On return trips the trucks principally hauled sacked flour out of the Wichita Falls mill (R. 167) and picked up bulk wheat on their return (R. 168). Common carriers did not have satisfactory equipment in which to transport bulk wheat (R. 168, 169). Petitioner did not maintain terminals or warehouses; his trucks were left upon respondent's premises at Wichita Falls (R. 169).

At the time the contract was entered into with petitioner respondent had the problem of distributing its products in competition with other mills within the trade area surrounding its mill, as well as the actual problem of transportation, all of which was provided for in the contract with petitioner (R. 170), who under the contract obligated himself to deliver and transport respondent's products *according to its requirements* (R. 88). Under the contract petitioner's trucks were devoted exclusively to handling respondent's merchandise (R. 89). Respondent reserved

the right to specify the manner in which petitioner's trucks should be painted and reserved the right and privilege of requiring advertising or other written matter to be painted thereon.

Frank Cross, in charge of transportation for respondent, testified that respondent's products moving more than 150 miles from Wichita Falls generally went by rail in carload shipments (R. 199). The deliveries within a radius of 150 miles from Wichita Falls moved as LCL (less than carload) shipments and prior to the arrangement with respondent were generally handled either in respondent's trucks or under a separate trucking arrangement (R. 199-200). This witness analyzed the transportation of respondent's commodities in and out of its Wichita Falls plant during the 27-month period covered by petitioner's operations, and for the preceding 27-month period, and found that no tonnage handled by common carriers during the preceding 27-month period was diverted to petitioner's trucks. The tonnage delivered by petitioner was substantially the same tonnage which, during the preceding period, respondent delivered in its own trucks (R 200-208). According to the same witness, petitioner served in his trucks one hundred and forty points or destinations. Twelve of these points did not have any common carrier service at all (R. 209). Forty-eight of the points did not have any direct rail or common carrier service (R. 209). Of the remaining eighty points having common carrier service, forty-two were served by both rail and truck lines; twenty-four were served by truck lines only; and fourteen by rail

lines only. Eleven of the eighty points required an interline or joint service (R. 209-210). Petitioner did not maintain any docks, stations or depots such as common carriers (R. 210); he did not use pickup and delivery trucks (R. 211) so as to require a double handling of merchandise; the witness Cross pointed out that about 70% of the tonnage handled by petitioner was sacked flour (R. 207) and that flour is very susceptible to contamination (R. 212). In order to prevent contamination trucks in which flour is hauled must be kept clean and fumigated; lined with a special kind of paper; and not mixed in the same truck with other merchandise (R. 212-213). This was one of the reasons why a specialized service such as furnished by petitioner was required and that common carrier service was not adequate or suitable (R. 212-213).

Petitioner Steele testified before the Railroad Commission and a transcript of his testimony was read at the trial of the case (R. 233-238). His testimony in substance shows that it was impractical to ship LCL flour by common carrier truck or rail lines for numerous reasons, including contamination (R. 234), and delays in shipment (R. 235). He pointed out that in most instances two line hauls were required when common carrier service was used (R. 237); whereas respondent required its deliveries to be made at any time and over any routes. To use his words:

> "In other words, we go sometimes in a circle, and come back which would be the shortest way around" (R. 236).

Petitioner hauled for General Mills alone; his permit and the order granting it confined his operations to handling products of General Mills (R. 94 to 100). Mr. Christopher, in his letter of April 11, 1941, to respondent's representative, himself agreed with the jury's special verdict that the service to be rendered by petitioner was not similar service to that rendered by common carriers. He reached this conclusion from the facts in connection with his construction of Sec. 6-aa of the Motor Carrier Act. He made this very pointed statement (R. 150):

> "It may not, therefore, be said that the service which will be rendered by this contract carrier can never (ever) in any event be a substantially similar service to that rendered by common carriers."

The agreement of the parties, expressed in the supplemental contract (R. 156), that the Railroad Commission of Texas had not fixed rates, charges or tariffs for the kind of services to be rendered under the contract, was of necessity an agreement that the services to be performed were not competitive with services rendered by common carriers and that such service was not substantially the same as common carrier service. The order of the Railroad Commission (R. 94 to 98), relied upon by petitioner as a ratemaking order, finds facts from which only one inference can be made, and that is that the service to be performed by petitioner was not competitive with common carrier service and was not substantially the same as common carrier service.

The foregoing brief summary demonstrates that the evidence in the trial court amply sustains the special ver-

dict of the jury. In fact, the sufficiency or insufficiency of the evidence to sustain the special verdict of the jury in the trial court is not before this Court since the trial court permitted the special verdict to stand and did not set it aside.

ARGUMENT AND AUTHORITIES

Section One

Answer to Section Two of Brief of Petitioner.

1.

The Railroad Commission was without lawful power to fix rates or charges for the transportation services rendered by petitioner because the evidence showed and the jury in the trial court found that the operations of petitioner over the highways of Texas were not in competition with common carriers and the services performed by him were not substantially the same as those performed by common carriers. The orders and acts of the Commission, insofar as they may be construed as an effort on the part of the Commission to fix minimum rates and charges for the transportation services here involved, were therefore void.

2.

The Railroad Commission of Texas did not undertake to apply minimum rates and charges to the transportation services here involved.

3.

If the orders of and permit issued by the Commission be construed as applying the rates set forth in the tariff relied upon by petitioner as minimum rates for the transportation services here involved, then such orders, permit and tariff to this extent are void

on their faces because the Commission failed to find, as it was required to do, before exercising the limited and conditional ratemaking power conferred upon it by law, that the proposed operations of petitioner were in competition with the operations of common carriers over the highways of the state.

4.

Respondent did not invoke the jurisdiction of the Railroad Commission to fix rates for the contract for carriage here involved nor for any purpose whatever.

5.

If the Legislature of Texas did declare the operations of every contract carrier to be in competition with common carriers and authorize the Commission to apply the minimum rates of common carriers to the operations of all contract carriers, then the statute and the acts of the Commission thereunder as applied to the transportation services here involved contravene the Fourteenth Amendment to the Federal Constitution and are void.

6.

If the Texas statute is construed as not requiring the Commission to find the existence of facts prerequisite to the exercise of its conditional ratemaking powers, then the statute violates the due process clause of the Federal Constitution.

All of the above propositions of law were urged by respondent in the trial court. The ruling of the trial court

thereon was adverse to respondent. This ruling was properly assigned as error by respondent in the court below by appropriate specifications of error. These specifications of error were disposed of by the court below in the following language:

> "We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him" (R. 312).

Had the court below sustained the specifications involving the points here presented, the same judgment as was entered by that court would have necessarily followed. The grounds here stated are not presented to overthrow the judgment of the court below but to sustain such judgment. They present additional reasons why the judgment should be sustained. Respondent has the right to present these additional grounds here and if this Court finds any or all of such grounds to be well taken the judgment of the court below should be affirmed, even though this Court might conclude that the court below improperly decided the law question upon which that court based its judgment. *Langnes* v. *Green*, 282 U. S. 531, 535, 536, 537.

539; 75 L. Ed. 520; *Story Parchment Co.* v. *Paterson Parchment Paper Co. et al.*, 282 L. S. 555, 560, 75 L. Ed. 544; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 190, 191, 81 L. Ed. 593.

A. The State Legislature only delegated to the Commission power to fix minimum rates for that class of contract carriers which operate in competition with common carriers over the highways of the State.

This point involves the real crux of this case. Petitioner's entire argument is dependent upon his present construction of the State statute. His counsel undertakes to presently construe the State statute as conferring unlimited and unconditional power upon the Commission to fix rates for contract carriers regardless of whether such contract carriers do or do not operate in competition with common carriers over the highways of the State (see pages 43-50 of his brief). He proceeds upon the theory that the Legislature of Texas decreed by legislative fiat that all contract carriers operated in competition with common carriers over the highways of the state and that both rendered substantially the same service. There has been a radical change in counsel's opinion upon this subject[1]. Nevertheless, counsel now take the contrary view. Their present position is grounded upon the language contained in the caption of the Act (see petitioner's brief, page 43), wherein the following is found:

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1 See undenied testimony of witness Colfix (R. 147-148); letter of Mr. T. S. Christopher to L. B. Colfix (R 149-151); and terms expressed in supplemental agreement (R 155-156)

"Giving to the Railroad Commission of the State of Texas power and imposing upon it the duty to fix, prescribe or approve maximum or minimum or maximum and minimum rates, fares and charges for motor carriers doing business as common carriers, and minimum rates, fares and charges for motor carriers operating as contract carriers."

Proceeding upon this assumption, it is then asserted that the language found in Section 6-aa[2] constitutes a legislative finding that all contract carriers operate in competition with common carriers over the highways of the state and perform substantially the same service. This notwithstanding the fact that the Legislature defined the term "contract carrier" (subd. [h][3], Sec. 1, *Article 911b)* as meaning any motor carrier transporting property for hire over the highways of the state other than as a common carrier. The term "motor carrier", in Subd. (g)[4], Sec. 1, Article 911b, is defined to be anyone owning, controlling, managing, operating or causing to be operated any motor-

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2 "Sec. 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

3 Subd. (h): "The term 'contract carrier' means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier."

4 Subd. (g): "The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

propelled vehicle used in transporting property for compensation or hire over any public highway in this state. All private motor operations are included within the definition of contract carriers. *Texas and Pacific Ry. Co. v. Railroad Commission et al.*, 138 S. W. (2d) 927, 930. Obviously, there are many types of motor carrier service thus defined, which are substantially different from common carrier service and which are in nowise competitive. A farmer who incidentally hauls his neighbor's cow to market for hire in a farm truck is a contract carrier, regardless of the point of origin, the point of destination or the route traveled, but his service cannot be said to be competitive with common carriers nor substantially the same. There are many types of private transportation which do not compete with common carriers and which are not substantially the same. The evidence here showed and the jury found (R. 80) that petitioner's operations were not in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same services as those rendered by common carriers. The Legislature, in the enactment of Section 6-aa of the Motor Carrier Act, recognized the difference between contract carrier operations. It recognized that some contract carriers were competitive with common carriers and that the services performed were substantially the same, and that competition did not exist between others. The power of the Commission to regulate rates was specifically confined to that class of contract carriers who operate in competition with common carriers. The language of Section 6-aa is too plain to require construction. The Commission is authorized to prescribe rules

and regulations covering the operation of contract carriers in competition with common carriers and to prescribe minimum rates *for such contract carriers.* The expression of the one condition which must be present to authorize the Commission to act with respect to rates under the maxim *expressio unius est exclusio alterius* excludes the power, absent the existence of the condition. *Red River National Bank et al.* v. *Ferguson et al.*, 109 Texas 287, 295. The Supreme Court of Texas, applying this rule of construction in the cited case, said:

> "The Act, as has been stated, by implication, authorizes the wife, when joined by her husband, to become the joint maker of a note of another and a surety upon another's bond or obligation. This was the conferring of an original power—one with which she was not theretofore invested. In such cases the maxim, *expressio unius est exclusio alterius,* has marked application. Sutherland on Statutory Construction, sec. 491. It excludes any authority under the Act for her joining in her husband's obligations or becoming his surety."

It is impossible for us to read into this language a legislative fiat to the effect that all contract carriers operate in competition with common carriers. The language is certainly not susceptible to any such construction. Our construction of Section 6-aa is directly sustained by the Austin Court of Civil Appeals in *Texas and Pacific Ry. Co.* v. *Railroad Commission et al.*, 138 S. W. (2d) 927, 930, wherein it is said:

> "Contract carriers, a distinct and separate class from common carriers, must obtain a 'permit' to operate as

such. Sec. 6 prescribes the requisites of an application therefor and Sub. (3) (c) of that Section forbids the granting of such permit if operation thereunder 'will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory.' *And where authorized contract carriers operate in competition with common carriers the Commission must prescribe minimum rates, fares and charges for such services which must not be lower than those prescribed for common carriers for substantially the same service. See Sec. 6aa.*" (Emphasis ours.)

There is no Texas case to the contrary. Every private carrier, regardless of the nature of his service, must obtain a contract carrier permit and comply with the provisions of the Act and the rules and regulations of the Commission designed to promote safety upon the highways of the state and to preserve the highways against damage. Each private contract carrier must post a bond, file an application for a permit, not overload, and comply with the safety regulations. The Commission is not authorized to grant a permit which will impair the efficient public service of any authorized private carrier or contract carrier. But the Commission is only authorized to fix minimum rates for that class of contract carriers which operate in competition with common carriers. The minimum rates thus prescribed must not be lower than those fixed for common carriers performing substantially the same service. The power only exists where there is competition. The yardstick for the exercise of that power is that the minimum rates prescribed pursuant to the power delegated shall not be less than rates prescribed for common car-

riers performing substantially the same service. Our construction of the Act is not contrary to, but in accordance with, the construction this Court placed upon the Act in *Stephenson v. Binford*, 287 U. S. 251, 273, 274, 77 L. Ed. 288. The point here involved was not involved in *Stephenson v. Binford*. In that case a motor carrier refused to obtain a permit, as he was obviously required to do, and sought to enjoin the law enforcement agents of the state from enforcing the Act against him. This Court held that the Legislature of Texas had the constitutional right to require a person thus situated to obtain a permit to operate a motor vehicle over the highways of the state for hire. By analogy, the case of *Stanaland et al. v. Traders & General Insurance Co.*, 195 S. W. (2d) 118 (Tex. Civ. App.), is in point. This case involved the Texas Compensation Act. Section 8a, Article 8306, Compensation Act, provides in part as follows:

> "The compensation provided * * * shall be for * * * dependent grandparents, dependent children, and dependent brothers and sisters of the deceased employee; * * *."

Construing this section the Court in the cited case said:

> "The claim of Mrs. Stanaland falls under the 'dependent brothers and sisters of the deceased' classification of relationships; *and one of the questions to be decided is whether at the time of the death of Ed Miller the facts showed Mrs. Stanaland was a dependent of his within the meaning of the foregoing provision of Section 8a.*" (Emphasis ours.)

The language used in the caption of the Motor Carrier Act is broader than the language used in the enact-

ment and does not express the limitations upon the rate-making powers of the Commission over contract carriers found in the Act itself. For that matter many of the essential provisions of the Act are not undertaken to be set forth in the caption. Regardless of this, however, the language of the enactment controls over the caption. The caption is no part of the enacting clause. The caption may be looked to in aid of construing doubtful language in an enactment, but where the language of the enactment is clear, as here, the language in the enactment cannot be added to by the title or caption. *Red River National Bank* v. *Ferguson et al.*, 109 Texas 287, 294. The following is taken from the opinion of the Supreme Court of Texas, at page 294:

> "But the title, of itself, has no enacting force, and can not confer powers not mentioned in the Act."

See also *Felton* v. *Johnson*, 247 S. W. 837 (Tex. Com. App.); *Strathearn Steamship Co.* v. *Dillon*, 252 U. S. 348, 354, 355, 64 L. Ed. 607; *Lapina* v. *Williams*, 232 U. S. 78, 91 and 92, 58 L. Ed. 515.

This Court, in *Strathearn Steamship Co.* v. *Dillon*, *supra*, said:

> "But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in case of doubt" (Page 354, Volume 252 U. S.).

The history of this legislation fortifies our position.

The first enactment of the Texas Legislature in 1929 undertook to convert all private carriers into common carriers. *Texas and Pacific Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 929 and 930. But in the 1931 enactment (911b), repealing the 1929 enactment, the Texas Legislature dealt separately with contract and common carriers and confined the ratemaking powers of the Commission over contract carriers to a narrow, conditional and limited field. This was doubtless due to the holdings of this Court in *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101, and *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264. No doubt the Texas Legislature felt the ratemaking provisions of the Act would be valid if extended only to contract carriers operating in competition with common carriers under the constitutional doctrine laid down by this Court in the *Shreveport rate cases* and other allied cases[5].

It is also a well recognized rule that where the meaning of a state statute is subject to two constructions, one of which will render the statute violative of the Constitution and the other will not, the court will construe the statute in such a way as to make it conform with the Constitution. *City of Waco* v. *Landingham* (Tex. Sup.), 157

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5 **Houston, East & West Texas Ry. Co. v. U. S. et al., 234 U. S. 342, 58 L. Ed. 1341; George T. Simpson et al. v. David C. Shepard, 230 U. S. 352, 57 L. Ed. 1511.**

S. W. (2d) 631, 633[6]; *Arkansas Natural Gas Co.* v. *Arkansas Railroad Commission*, 261 U. S. 379, 383, 67 L. Ed. 705, 710; *Friedman* v. *American Surety Co. of N. Y.* (Tex. Sup.), 151 S. W. (2d) 570, 578. This statute is not of doubtful meaning, but if it were this Court certainly would not adopt the construction petitioner undertakes to place thereon, for in doing so the statute would be plainly violative of the national Constitution under the holdings of this Court in *Frost* v. *Railroad Commission* and *Smith* v. *Cahoon, both supra.*

B. The Commission did not fix rates applicable to the services rendered by Petitioner.

The rates sought to be applied here are those prescribed in Texas Motor Freight Class and Commodity Tariff No. 1-A, which tariff was promulgated by the Commission primarily for common carriers. This tariff superseded Tariff No. 1. By general order entered on August 22, 1931 (following the promulgation of Tariff No. 1), the Commission directed that:

> "all Contract Motor Carriers as hereinbefore defined be and they are hereby ordered to observe and apply as minimum temporarily and until further orders of this Commission, * * * the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Class 'A' Motor

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[6] The Supreme Court of Texas in **City of Waco** v. **Landingham**, *supra*, at page 633, said:

> "In this connection, we think it is a settled rule of statutory construction that where the language of a statute is broad enough to cover matters without, as well as within, the power of the Legislature to enact, courts should construe the statute in a restricted manner, as applying only to matters lying within the legislative power. This rule should be applied in all instances, unless the statute itself clearly indicates otherwise."

> Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended" (R. 101).

Subsequently the Railroad Commission of Texas adopted Motor Freight Class and Commodity Tariff No. 1-A, which became effective June 26, 1940. Section 3 of this tariff provides for the application of the rates therein set forth. Item 470 prescribes that the rates, rules and regulations in the tariff shall be observed "by Contract Motor Carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary" (R. 103).

It is the position of petitioner that because the permit issued to Steele (R. 99-100) did not provide that the rates prescribed in Tariff 1-A should not apply, such rates so prescribed automatically were applicable. It is also his position that the reference contained in the order of the Commission (R. 96) as follows:

> "In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers",

constitutes an order directly applying the tariff rates relied upon to the transportation services here involved. We submit these contentions are untenable. Tariff 1-A, prescribing rates for common carriers, is not applicable because the service performed by petitioner under the evidence and the special verdict was not substantially the same as the services performed by common carriers. Hence the tariff prescribes a rate for a different kind and char-

acter of service than that performed by petitioner. The Commission was without power under the legislative grant of authority to fix a blanket minimum rate applicable to all contract carriers. It was necessary for the Commission to consider each application for a permit on its own merits, to determine if the proposed operations thereunder were competitive with common carriers, and if the services to be performed were substantially the same as those performed by common carriers. Therefore it must of necessity be presumed that the Commission, in the rules set forth in Item 470, Section 3, Tariff 1-A, of date June 26, 1940, intended that the tariff should be observed by contract carriers as a minimum when such contract carriers operated in competition with common carriers and performed substantially the same service. It cannot be assumed that the Commission intended to exceed its authorized statutory powers and violate statutory directions. The provision in the general order of August 22, 1931, cannot be construed as applying Tariff No. 1-A, effective June 26, 1940, to the operations here involved, because the order of August 22, 1931, related to Tariff No. 1, which was superseded by Tariff 1-A. The reference in the order (R. 96) is insufficient of itself to constitute an order making the tariff applicable. This reference must be considered in connection with the tariff itself and evidences only the attitude of the Commission if the operations became competitive with common carriers and the services performed substantially the same as those performed by common carriers. In other words, the Commission pointed out a guide to petitioner in event the contingency mentioned should arise during the course of operations. The jury found

neither contingency arose. It must be further remembered that Tariff 1-A, and the rules and regulations therein set forth, were in effect long before the execution of the original or supplemental agreement here involved. The permit was issued and the order of the Commission (R. 94-96) was entered prior to the execution of the supplemental agreement (R. 155-159). In this contract, it was specifically agreed by the parties that the Railroad Commission of Texas had not fixed any rates, charges or tariffs for the kind and character of service to be rendered by petitioner for respondent. It is inconceivable how petitioner can now contend that the Railroad Commission of Texas did in fact fix rates when, subsequent to the permit and orders now relied upon, and with full knowledge thereof, petitioner in writing agreed that *no rates, charges or tariffs were prescribed by the Commission for the services to be rendered by petitioner.* It is submitted that the Record in this case wholly fails to disclose that the tariff relied upon by petitioner was ever made applicable by the Commission to the transportation services involved. On the other hand, the Record affirmatively discloses to the contrary. Petitioner having been fully paid in accordance with the terms of his contract, the judgment of the Circuit Court of Appeals is correct.

C. If it be assumed that the Commission undertook to make Tariff 1-A applicable to the services performed by petitioner, the action of the Commission is void.

The point here presented is whether the Commission had lawful power to fix rates for the transportation services here involved, absent a finding of competition and

absent competition in fact. It is not a question of whether possessed power *was improperly exercised*. With this distinction in mind, the authorities cited by petitioner are readily distinguishable. Judicial inquiry into the *power* of an administrative body is always proper. Presumptions of regularity only exist where power to regulate is unquestioned. For instance, this Court, in *Pacific States Box & Basket Co.* v. *White et al.*, 296 U. S. 176, 80 L. Ed. 138, quoted from in petitioner's brief, at pages 39 and 40, said:

> "Where the regulation is by an order of an administrative body, that body acts under a delegation from the Legislature. The question of law may, of course, always be raised whether the Legislature had power to delegate the authority exercised" (Page 186, 296 U. S.).

If the point had been involved in *Pacific States Box & Basket Co.* v. *White, supra*, this Court doubtless would have made the further announcement that the existence and extent of the delegated power was also a proper question for judicial review. This Court did say:

> "But where the regulation is *within the scope of authority legally delegated*, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and *to orders of administrative bodies*" (Page 186, 296 U. S.). (Emphasis ours.)

Conversely, this presumption will not apply where the regulation is *not* within the scope of authority legally delegated.

Also in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 80 L. Ed. 1033, quoted from at page 41 of peti-

tioner's brief, this Court announced that the presumption of constitutionality prevailed where the act of a legislative body was "within the scope of its power" (288 U. S., at page 83).

Petitioner also relies on *Spence* v. *State National Bank*, 5 S. W. (2d) 754, which is quoted from at the top of page 42 of his brief. It is merely held in the *Spence case* that where general jurisdiction over subject matter exists a failure to observe the requirements of a procedural statute does not render a judgment void.

Security Trust Co. of Austin v. *Lipscomb County*, 180 S. W. (2d) 151, another case relied upon by petitioner and quoted from at pages 42 and 43 of his brief, deals with the validity of a judgment rendered by a court in a controversy *within the scope of its general jurisdiction*. It was a case in which the court "had authority to decide this question either rightly or wrongly." Having the authority to decide the question, the validity of the court's judgment as against collateral attack did not depend upon whether the decision was right of wrong. In *Railroad Commission* v. *Rapid Transit Co.*, 92 S. W. (2d) 261, cited and quoted from at page 44 of petitioner's brief (quoting from the opinion):

> "The order was one which the commission *had authority to make* and was therefore presumptively valid." (Emphasis ours.)

The same rule was recognized by this Court in *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510, quoted from at page 48 of petitioner's brief. There the Commission was purporting to act under authority legally delegated. In fact, this Court examined the legisla-

tive act for the very purpose of determining if it conferred the power exercised by the Commission and, after holding the act conferred the exercised power, struck down the Act because violative of the Fourteenth Amendment to the Federal Constitution in a collateral proceeding initiated in the Western District of Texas.

The order of the Commission involved in *United States* v. *Berwind-White Coal Mining Co.*, 274 U. S. 564, 71 L. Ed. 1204, was within the legislative grant of power. It was claimed that the findings of the Commission upon the issue of discrimination were unsupported by evidence. There was simply involved the exercise of power and not the issue of lack of power. We have previously demonstrated that the Railroad Commission of Texas does not exercise general and unlimited power over rates of contract carriers. The Commission under the Texas Act only exercised conditional power over such rates and may not exercise this power at all *absent competition between the contract carrier and common carrier over the highways of the state*. Unless competition is shown the Commission may not fix rates, either rightly or wrongly. If it is made to appear that competition exists between the operations of a contract carriers and common carriers over the highways of the state, then it might be presumed, absent facts to the contrary, that the minimum rate fixed by the Commission for the contract carrier was the same as the rate for common carriers performing substantially the same service. But the existence of the condition which is necessary and precedent to any authority at all will never be presumed in the absence of a finding of the Commission or facts *aliunde* the record. Jurisdictional facts are not

presumed merely from the Act itself. *Cunningham* v. *Robison*, 136 S. W. 441; *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083; *Willis* v. *First Real Estate & Invest[illegible] Co. et al.*, 68 Fed. (2d) 671; *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633; *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446.

The orders and proceedings before the Commission, introduced in evidence, construed most favorably to petitioner, were silent upon these two issues of fact inquired into by the trial court. The finding of the Commission quoted from at pages 37 and 38 of petitioner's brief (R. 96) as follows:

> "The Commission, after carefully considering the evidence, the laws, and its own rules and regulations, is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier";

is certainly not a finding that the proposed operations of petitioner were competitive with the operations of common carriers over the highways of the state. Under the statutory definition every private carrier is a contract carrier. The reference to the Commission's tariffs (R. 96) as follows:

> "In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers";

is in no sense a finding of the existence of facts authorizing the Commission to exercise its conditional ratemaking power. In fact, the order as a whole (R. 94-98) finds facts which in themselves show lack of competition rather than the existence of competition. The permit itself is silent upon the subject. The trial court submitted both issues of fact to the jury and the jury, by special verdict, found that petitioner's operations were not competitive with common carriers over the highways of the state and that the services performed by him were not substantially similar to those performed by common carriers. The special verdict, as previously stated, was not set aside but allowed to stand and is conclusive upon the facts in this case. *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633, by the Supreme Court of Texas, is in point. The Constitution of Texas confers upon the county courts exclusive original jurisdiction over estates of deceased persons. The effect of the constitutional provision is to confer upon county courts the general power to administer the probate law in accordance with legislative enactments. The homestead of a deceased person may not be sold to satisfy creditors of the deceased if a widow or minor child survives. In the cited case of *Cline* v. *Niblo*, the County Court, in the exercise of its probate jurisdiction, entered an order directing the sale of certain property for the purpose of satisfying claims of creditors which had been allowed by the Probate Court. The order of the Probate Court was silent with respect to whether the property was the homestead of the deceased and with respect to whether minor children survived. A direct appeal was not taken to the District Court as authorized by the Texas probate laws. The property was

sold pursuant to the order of the Probate Court and purchased by Cline for value. Thereafter the purchaser's title was attacked in a collateral proceeding by the heirs of the deceased. The question was squarely presented to the Supreme Court of Texas whether in such a proceeding the court was warranted in determining if the real estate was the homestead of the deceased, if minor children or an unmarried daughter survived the deceased, and if facts existed justifying the Probate Court to order the sale of the homestead. The Record in the Probate Court was silent with respect to these elements. The Supreme Court answered this question in the following language:

> "If the probate records show that the court has attempted to exercise a power which it does not have, the judgment is void on its face, amounts to nothing, and may be disregarded in any forum. Freeman on Judgments (5th Ed.), pars. 382, 395. In cases, however, where the vice in the decree does not appear on its face, and the judgment does not show that the homestead question has been adjudicated, the courts permit the true facts to be shown and the invalidity of the decree to be established aliunde the record. (8 S. W. (2d) at page 632.)

The decision of the Supreme Court is grounded upon the rule that even though a court may have jurisdiction over the parties and the property, such court must also have the power to enter the kind of order, judgment or decree that was entered.

A very similar question was decided by the Commission of Appeals of Texas, acting for the Supreme Court, in the case of *State Line Consolidated School District* v. *Far-*

well Independent School District, 48 S. W. (2d) 616, from which we quote:

> "It is true that our laws provide in certain instances that the orders and proceedings of county school boards can only be questioned by appeal to higher school authorities, but, when a school board acts without authority of law and contrary to express statute, and in such a manner that its act is void, then the courts of the land may be appealed to directly without first exhausting the remedy of appeal through the school authorities. *County School Trustees of Jackson County* v. *Edna Independent School District* (Tex. Com. App.), 34 S. W. (2d) 860; *Brockman* v. *Echols* (Tex. Civ. App.), 22 S. W. (2d) 686; *Collin County School Trustees* v. *Stiff* (Tex. Civ. App.), 190 S. W. 216 (writ ref.); *Freeport Independent School District* v. *Common School District*, 115 Tex. 133, 277 S. W. 97; *Henderson* v. *Miller* (Tex. Civ. App.), 286 S. W. 501 (writ ref.).
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> *"In connection with the above we hold that the county board of trustees is an administrative body with certain defined powers and duties. It can only exercise such powers and perform such duties as are expressly defined by statute, or necessarily implied therefrom* (48 S. W. (2d) at page 617). (Emphasis ours.)

The laws of Texas confer upon District Courts the power to remove disabilities of minority where the minor resides in the county of the district in which the petition is presented and where he is over nineteen years of age. The jurisdiction of the District Court is thus limited and conditional. The Supreme Court of Texas, in *Cunningham* v. *Robison*, 136 S. W. 441, held that an order of the District

Court undertaking to remove disabilities of a minor was void where it failed to appear from the order or from the record that the minor resided in the county where the petition was presented and was over nineteen yars of age. The Court held the order was subject to a collateral attack in another proceeding and was not (p. 441) entitled to the presumption of verity, especially as to the jurisdiction of the court, as would be the case where the function performed was that of the ordinary judicial powers of the court. The Commission of Appeals of Texas in another case, *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083, referring to the taxing power of a school district, held:

> "In a case like this of limited jurisdiction, where the right of the tribunal to proceed at all depends upon the existence of a given fact or the doing of a specific act, such fact or act is jurisdictional and precludes any further proceeding until it is shown to exist or to have been performed, as the case may be. The proceedings of such special tribunals, like inferior courts not of general jurisdiction, are not entitled to the presumptions of regularity usually attaching to official acts, until their jurisdiction—their right to act at all—is first affirmatively shown." (290 S. W. at 1084.)

Anderson, Clayton & Co. v. *Allred*, 62 S. W. (2d) 107 (Texas Com. App.), involved the Texas Motor Carrier Act. The Railroad Commission was attempting to regulate trucks of Anderson, Clayton & Company under the provisions of the Act. It was held that the court in a collateral proceeding could determine if the operations of Anderson, Clayton & Company came within the legislative definition

of contract carriers for hire so as to be subject to the provisions of the Texas Motor Carrier Act.

The Supreme Court of Texas in the recent case of *Cobb et al.* v. *Harrington et al.*, 190 S. W. (2d) 709, held that a court in an independent action for declaratory judgment may determine if operators of trucks are subject to the Motor Carrier Act, notwithstanding Section 20 of the Act, permitting appeals from orders of the Commission to the District Court of Travis County.

It has been held by this Court, in cases arising under the full faith and credit clause of the federal Constitution that it is always proper for a court in another state to inquire into the power or jurisdiction of the court of a sister state to render the judgment sought to be enforced. *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538.

Petitioner was a private carrier. The permit under which he operated authorized him to haul only for respondent. The contract under which he operated likewise required him to haul exclusively for respondent according to its requirements. No question of public interest is here involved in the rates charged by petitioner and paid by respondent under the private contract of carriage. A contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He had no other customer in whose favor he could discriminate. The rights of common carriers are not affected because the operations were not competitive and the services performed by petitioner were not similar to those performed by common carriers. If it be assumed that the Commission

under these circumstances undertook to make Tariff 1-A applicable to the services performed by the petitioner, the action of the Commission is void. The provision with respect to application of rates contained in Tariff 1-A, effective June 26, 1940, if construed as an order applying such tariff to the transportation services here involved, is void on its face because the order was entered long before petitioner's application was filed and is a general order applicable to all contract carriers, without reference to the character of operation or services to be performed by a particular carrier. It was never contemplated by the Legislature of Texas under Article 911b that such an order would comply with the requirements of the statute. Furthermore, in no event is the tariff effective until the permit is issued, for the permit might well provide otherwise with respect to rates. If, as contended by petitioner, the failure of the permit to make other provisions with respect to rates and the reference to the tariff contained in the order constituted an effort on the part of the Commission to apply the tariff rates to the services to be performed by petitioner under the permit, the permit and the order are each void on their faces to the extent that either of them constitutes a ratemaking order because of the failure of the Commission to find, there or elsewhere in the Record, that the operations of petitioner under the permit are or would be competitive with common carriers over the highways of the state. The actions of the Commission also are void under the facts as found by the jury in its special verdict. The jurisdictional facts, the presence of which is necessary to authorize the Com-

mission to exercise the limited and conditional ratemaking power granted by the Legislature, do not appear in the order or findings of the Commission or elsewhere in the Record. On the contrary, the facts as found by the jury are affirmatively to the contrary. Even if a Commission exercises general and unconditional power, findings of fact justifying the exercise of such power must be made where the act authorizing the use of power requires such findings. *Wichita R. R. & Light Co. v. Public Utilities Commission of the State of Kansas*, 260 U. S. 48, 58, 59, 67 L. Ed. 124.

Article 911b, Section 12a, expressly requires the Commission, along with its order, to file a "concise written opinion, setting forth the facts and grounds for its action," in all instances where the application is contested. The Record conclusively discloses that the application of petitioner for a permit was a contested application. So if the Commisison did in fact undertake to fix rates, it was required under the express provisions of the Act to file findings justifying its action. The Commission did render an opinion and make findings (R. 94-98),[7] but there is no finding justifying the Commission in fixing rates. On the other hand, the facts found are to the contrary. So, regardless of the nature of the power conferred upon the Com-

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7 Such findings would have been unnecessary had not the proceedings been contested. The Commission's order recites the application came on for hearing after due notice to all interested parties. The order shows that testimony contrary to the application was introduced before the Commission; the order shows the application was granted in part and denied in part and provided for exceptions to be filed. The partial transcript of petitioner's testimony before the Commission (R. 234-238) shows the hearing was a contested one and that a Mr. Smith appeared and interposed certain objections to petitioner's testimony

mission, its ratemaking order (if construed as such) is void on its face because of the lack of necessary findings. Also see *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 932. But here it conclusively appears from the legislative enactment itself that the Commission exercised only conditional and limited power over contract carrier rates. Therefore, even without statutory requirements, it must appear from the order of the Commission or at least from the record that the prerequisite facts justifying ratemaking powers exist. Otherwise the order is void on its face.

D. The Collateral Attack rule has no application.

The Commission is only empowered to fix minimum rates in instances where a contract carrier is operating in competition with common carriers over the highways of the state. *Section 6aa, Article 911b, supra.* In order to invoke the limited and conditional power granted the Commission it must appear either from findings of the Commission, supported by evidence, or by evidence *aliunde* the Commission record, where an order of the Commission is sought to be enforced, that the jurisdictional facts authorizing the ratemaking order are present. *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633 (Sup. Ct. of Texas); *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616 (Tex. Com. App.) *Cunningham* v. *Robison*, 136 S. W. 441 (Tex. Sup. Ct.); *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083 (Tex. Com. App.) Absent both a finding of the Commission and

evidence *de hors* the Record, the order is utterly void under the cases above cited. Where, as here, the Commission acted without authority of law, the appeal statute *(Section 20, Article 911b)* has no application. The mere fact the Commission acted does not carry with it a presumption of regularity or verity which usually follows an order or judgment of a court of general jurisdiction. Speaking of the existence of facts empowering the Probate Court to decide a question, the Supreme Court of Texas, in *Cline* v. *Niblo*, *supra*, said:

> "If the record shows that the questions whether or not the property was homestead, or that the debts involved were chargeable against a homestead, then these issues, other requisites being present, are foreclosed, except upon direct attack upon justiciable grounds. Freeman on Judgments (5th Ed.), pars. 350, 372, 378, 379. But if these questions do not appear to have been adjudicated, the conclusive presumption of their involvement and determination does not obtain, and the real facts may be shown in another forum. This rule of law rests upon a sound basis." (Page 485, 117 Texas.)

The laws of Texas provide for special appeals from orders of a county school board in much the same manner as provided for under Section 20 of the Motor Carrier Act. Nevertheless, the Texas Commission of Appeals, acting for the Supreme Court of Texas, in the case of *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616, *supra*, specifically held:

> "As long as such board acts within lawful limitations its judgment and discretion can only be ques-

tioned by appeal to higher school authorities, but, when it goes outside its statutory limitations and acts without authority of law, its acts are void and may be questioned in a court action without the formality of an appeal to the higher school authorities." (Page 617, 48 S. W. [2d]:)

The Commission of Appeals in a case involving an assessment or order of an independent school district, *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083, *supra*, said:

> "*It will not do to say that this precedent fact necessary to give jurisdiction may be shown by the subsequent acts of the tribunal in harmony with its existence*, since this would be to attach to such subsequent proceedings the quality of official acts and the consequent force of evidence by way of raising a presumption of authority or power. *Such authority—in other words, jurisdiction—cannot be presumed from anything. It must be proved as any other fact is proved.*" (Page 1085, 290 S. W.) (Emphasis ours.)

District Courts of Texas are ordinarily courts of general jurisdiction but exercise special and limited jurisdiction over certain subjects. District courts may in certain instances remove disabilities of minority but may exercise this jurisdiction only in cases where the minor seeking to have his disabilities removed is over nineteen years of age and presents his application in the district court of the county where he resides. The Supreme Court of Texas, in *Cunningham* v. *Robison*, 136 S. W. 441, held that in such proceedings an order of a district court "is not entitled to the presumption of verity, especially as to jurisdiction of the court, as would be the case where the function per-

formed was that of the ordinary judicial powers of the court." (Page 441, 136 S. W.) Further, the Court said:

> "The statute of this state herein copied above confers special jurisdiction upon the district court to remove the disabilities of minors 'over the age of nineteen,' and the jurisdiction is conferred upon the district court of the county in which 'he may reside.' It is apparent from this language that the two facts—that the minor is over 19 years of age and that he resides in the county in which the proceeding is had—are jurisdictional in their character, and must be made to appear in the record in order to sustain the action of the court in exercising that power. A district court has no authority to remove the disabilities of a minor under 19 years of age. Therefore it must appear that such minor is over 19 years of age at the time. Such court has no jurisdiction except over such minors as may reside within the county in which the court is held. Therefore, in order to give jurisdiction, it must appear that the minor resided in the county where the court that made the order was held. Neither of these facts appear in the record as presented to this court, nor, indeed, are they alleged in the pleadings of the relator in this court. Whether this court will permit the proof of such fact outside the record is not presented to us, and we do not pass upon that question." (Page 442, 136 S. W.)

It does not appear from the proceedings before the Commission or from the orders of the Commission that the jurisdictional facts authorizing the Commission to fix rates were present. The Commission made no finding of the existence of such jurisdictional facts. Furthermore, the Motor Carrier Act itself, *Section 12, Article 911b,* re-

quires the Commission, with respect to all contested hearings, to "file a concise written opinion setting forth the facts and grounds for its action * * *." It must be conceded that the record in this case shows petitioner's application was contested. In fact, it is virtually conceded in petitioner's brief that Section 12 applies (brief, page 37). The Commission undertook to comply with the requirements of Section 12a of the Motor Carrier Act and did file a written opinion setting forth the grounds for its order (R. 94 to 98). The findings therein contained do not show that the requisite jurisdictional facts existed to authorize the Commission to fix rates. The facts found by the Commission in the order and opinion negative rather than confirm the existence of such jurisdictional facts. The jury in the trial court by its special verdict, supported by evidence, expressly found that the operations of petitioner under his contract with respondent were not in competition with common carriers over the highways of Texas (R. 80). It therefore does not appear, either from the proceedings before the Commission, the orders of the Commission or from the record in the trial court, that the jurisdictional facts authorizing the Commission to fix rates at all existed. On the other hand, the contrary appears. The question here involved is not whether the Commission erroneously decided a question which, in the language of the Supreme Court of Texas, it "had authority to decide—either rightly or wrongly" (*Massachusetts* v. *Davis*, 140 Texas 398, 405, 168 S. W. [2d] 216, 220; *Security Trust Company of Austin* v. *Lipscomb County*, 180 S. W. [2d] 151). Nor is it a case in which a court under the evidence is authorized to say

an object be black or white, such as the question discussed by the Supreme Court of Texas in *Land Company* v. *McClelland Bros.*, 86 Texas 179. On the other hand, under the record before this Court, the Railroad Commission was not authorized by law to fix *any rates or charges* for the transportation services. If the question presented was one in which the Commission was authorized to act and the complaint was that the rate fixed was too high or too low, or was discriminatory or was otherwise erroneous, then petitioner's petition with respect to collateral attack and the duty of an aggrieved party to pursue the remedy prescribed under Section 20 of the Motor Carrier Act would probably be correct.

The authorities cited by petitioner beg the point and support rather than decide against respondent. All of the cases cited involve attacks upon orders of regulatory bodies or judgments of the court *entered pursuant to legal authority*. The cases involve the question of whether the delegated authority was exercised rightfully or wrongfully. The complaint in *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. Ed. 390 (cited by petitioner), instituted an equity proceeding in the United States District Court to enjoin the Railroad Commission of Kentucky from establishing an alleged confiscatory rate, and to prevent complainant from withdrawing its service in certain communities. The complainant insisted that the order of the Commission was void because (1) confiscatory under the federal Constitution, (2) was not supported by findings of the Commission, and (3) that the Kentucky Legislature had not validly created the Commission under

the laws of Kentucky. With respect to the last objection, this Court held that the complainant had invoked the powers of the Commission to obtain a franchise and could not therefore assail the state statute creating the Commission (278 U. S. 307, 308). This is a familiar rule of law but has no application here. The power and authority of the Commission was then assumed and upon such assumption the Court held that complainant could not complain of the failure of the Commission to make findings in support of its order (power to make the order being present) in the absence of a showing that the rates fixed by the Commission were confiscatory (278 U. S. 310, 311). It was then held that confiscation was not shown and the order of the Commission was sustained. The power of the United States Court in a collateral proceeding to review the order of the Commission was sustained by this Court rather than denied.

In *Thompson* v. *Consolidated Gas Utilities Co.*, 300 U. S. 55, 81 L. Ed. 510, an equity proceeding for injunction in the United States Court, the petitioner complained of an order of the Railroad Commission on two grounds: First, that the legislative enactment did not confer authority upon the Commission to make the order and, second, that the legislative enactment was violative of the United States Constitution. The United States District Court assumed jurisdiction of the case and held the legislative enactment did not authorize the order of the Commission complained of in that suit. This Court disagreed with the lower court's construction of the power granted the Commission by the state law and construed the legislative en-

actment to delegate the power exercised by the Commission. The legislative enactment thus construed was held violative of the federal Constitution (300 U. S. 75). The judgment of the lower court was affirmed but upon a ground different from that on which the lower court predicated the judgment. This holding is squarely against the collateral attack contention here presented by petitioner, for this Court in a collateral proceeding did construe the legislative enactment for the purpose of determining if the order complained of was authorized thereby. This Court did use the language quoted from by petitioner at page 48 of his brief but qualified that language with this conclusion:

> "But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary." (Pages 69 and 70, 300 U. S.)

Notwithstanding the fact that the order of the Commission in the case last referred to was entered pursuant to delegated power, it was held to be void on the facts in a collateral proceeding. Under this Court's holding we are clearly entitled to test the power of the Commission to enter the alleged ratemaking order complained of in a proceeding in which petitioner seeks to enforce that order. *Greer* v. *Railroad Commission of Texas*, 117 S. W. (2d) 142, does not sustain petitioner's contention. The order of the Commission was attacked in the *Greer* case on two grounds: (1) That it was passed without notice or hearing; and (2) that it was unjust, unreasonable and discriminatory. The

Commission admittedly had jurisdiction over the subject matter of the order. The court held the order complained of was a general order and that notice and hearing were not required under the statute. On the other hand, the Court held:

> "Where the statute requires notice and hearing, such prerequisite is jurisdictional, and its omission renders the order void." (Page 145, 117 S. W. [2d].)

The holding of the Court in that case, which is here relied upon by petitioner was predicated upon the fact that the order complained of was not void and was entered pursuant to authority delegated by the Legislature. The portion of the opinion of the Court quoted from by petitioner, at pages 51 and 52 of his brief, therefore has no application.

Alpha Petroleum Co. v. *Terrell*, 59 S. W. (2d) 364, quoted from by petitioner at page 53 of his brief, merely holds that a statutory appeal from a rule of the Commission is necessary where the rule is valid on its face and *promulgated under the terms of the authority delegated by the Legislature*. This appears from the face of the very quotation from the opinion of the Court set forth at page 53 of petitioner's brief.

Likewise the order of the Commission complained of in *Producers Refining Co.* v. *Missouri-Kansas-Texas Ry. Co.*, 13 S. W. (2d) 679, quoted from at pages 53 and 54 of petitioner's brief, was one entered pursuant to authority delegated to the Commission and the subject matter of the order was within the jurisdiction conferred upon the Com-

mission. This being true, it was immaterial whether the Commission exercised general or limited jurisdiction.

Mingus v. *Wadley*, 285 S.W. 1084, quoted from at page 54 of petitioner's brief, has no possible application. The complainant in this case sought to enforce a special statutory right not recognized at common law. The statute granting the right defined the remedy and named the court in which the remedy might be enforced. The Court merely held that complainant was required to enforce the statutory rights in the method defined by law.

Texas Steel Co. v. *Fort Worth & Denver*, 40 S. W. (2d) 78, is quoted from at length in petitioner's brief, at pages 55 and 56. The Steel Company in that case complained of certain railroad common carrier rates fixed by the Commission. The Commission exercises general and not limited jurisdiction with respect to rates of common carriers by rail. The Court pointed out:

> "It is not contended that the orders of the Railroad Commission here collaterally attacked are void on their faces, or that the Railroad Commission was without inherent lawful jurisdiction to act in the premises." (Page 82, 40 S. W. [2d].)

The converse of this contention is true here. Respondent contends that the orders of the Commission here complained of, insofar as they may constitute ratemaking orders, are void on their faces, and that the Commission was without inherent lawful jurisdiction to act in this respect. It is well to note, in passing, that the orders complained of in the *Texas Steel* case were general orders and not special orders and the holding of the court in that case

to the effect that such orders were not void on their faces for want of notice must be read in the light of the holding in the *Greer* case, decided several years later, 117 S. W. (2d) 142, *supra*, to the effect that:

> "Where the statute requires notice and hearing, such prerequisite is jurisdictional and its omission renders the order void." (Page 145, 117 S. W. [2d].)

Burford v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424, cited at pages 56 and 57 of petitioner's brief, has no application. This was an equity suit brought in the Federal Court in which an injunction was sought against the enforcement of an order of the Railroad Commission. Jurisdiction was invoked under the diversity of citizenship clause. Complainant invoked certain rights under the state law and also contended that the order of the Commission denied him due process of law in violation of the federal Constitution. This Court held that the United States Court for the Western District of Texas could not be vested with appellate jurisdiction by a state statute to review the correctness of a decision of the Railroad Commission (Page 319, 319 U. S.). It was held that a federal equity court did have jurisdiction under the diversity of citizenship clause to protect legal rights but that the instant case was not a proper one *in which to exercise such equitable jurisdiction*. Jurisdiction of the federal court was invoked by the party complaining of the order of the Commission. This is not a proceeding in equity in which respondent is undertaking to invoke the jurisdiction of the United States Court to set aside an order of the Railroad Commission. It is merely defending against the attempt of petitioner to en-

force an unlawful order against respondent in an action at law in the United States Court. Petitioner and not respondent chose the forum. Respondent is entitled to assert and have protected its legal rights in this proceeding.

It must also be remembered that respondent was not a party to the special proceedings before the Railroad Commission in which the special order granting the permit was entered and in which it is claimed the Commission undertook to apply common carrier rates to the services here involved. For this additional reason the collateral attack rule should have no application. *State Mtg. Corp.* v. *Traylor* (Tex. Sup.), 36 S. W. (2d) 440, 443; *Texas Soap Mfg. Co.* v. *McQueary* (Tex. Civ. App.), 172 S. W. (2d) 177, 180.

Respondent does not challenge the power of the Commission to grant Steele a common carrier permit nor does it question the fact that petitioner was a contract carrier as defined by the Texas Act. Under the Act petitioner was clearly required to obtain a permit in order to operate over the highways of the state. The Legislature was authorized to require such a permit. As an incident to granting the permit the Commission was authorized to require petitioner to post a bond, not overload, and otherwise comply with the safety regulations of the Act. The permit as such and the order granting it are not here attacked, except and unless such permit and order, because of their silence upon the subject of rates, be construed as impliedly applying the common carrier tariff rates to the services involved, and then only to this extent.

Petitioner is undertaking to enforce the Commission orders and permit as ratemaking orders and to recover the rates thus fixed. In order to recover it was necessary for petitioner to show that the Commission acted within the power delegated to it by law. Petitioner completely failed to sustain this burden. Under the record in this case the collateral attack rule has no application and the permit and the orders of the Commission to the extent that they may be construed as an act of the Commission applying common carrier rates to the services here involved are void.

E. Respondent was not a party to the proceedings before the Commission and did not invoke the jurisdiction of the Commission to fix rates.

Petitioner's argument that respondent, a Delaware corporation, is estopped to complain of the ratemaking order of the Commission (if there was one in this case) is founded upon the erroneous assumption that respondent voluntarily came into Texas and invoked the jurisdiction of the Railroad Commission to fix rates. In the first place, there is no evidence when respondent obtained a permit to do business in Texas. So far as the Record is concerned it may safely be assumed that the permit was granted long prior to the enactment of *Article 911b, Revised Statutes of Texas*. There is not one iota of evidence that respondent was a party to petitioner's application for a permit or that it had any knowledge of the contents thereof. The evidence is to the contrary (R. 141-142). As a matter of fact, the application for a permit was filed long

prior to the date the first contract was signed.[8] Respondent was not charged with notice of the gratuitous statement in petitioner's application for a permit that petitioner expected to charge the Railroad Commission rates, particularly since the law did not require such a statement to be made. *Article 911b*[9] The law *(Article 911b)* makes no provision for a shipper or contractee to apply for or obtain a permit. A permit is not required of the contractee or shipper and no provision is made for it to be a party to the proceedings for the permit. The motor carrier is the only proper person to apply for a permit and the only person to whom such a permit may be issued. Respondent was not issued and has never held a contract carrier's permit; the transportation involved here was not performed under any permit issued to respondent. Besides, petitioner's application to the Railroad Commission was for a permit; *not to have rates fixed for services to be performed.* Respondent knew or was charged with knowledge of the fact that the Commission could not fix minimum rates in the absence of competition between an applicant for a contract carrier's permit and common carriers over the highways of Texas. *Respondent knew and the parties agreed that such competition did not exist.* Respondent did not know at the time it contracted with petitioner and does not now believe that the Railroad Commission ever undertook to apply minimum rates to the

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8 Application for permit filed August 27, 1940 (R. 94); first contract not executed and delivered until after April 17, 1941 (R. 152-3).

9 The Act, subdivision 3, Sec. 10, Article 911b, requires an applicant for a certificate of public convenience and necessity to operate as a common carrier to file a proposed schedule of service and rates to be charged, but no such requirement is made in an application for a permit to operate as a contract carrier. Sec. 6, subdivision (a).

transportation services here involved. The parties hereto expressly agreed that no such rates were fixed by the Commission. It is true that the so-called original contract did contain a provision such as is quoted from at page 33 of petitioner's brief. The history relating to the manner in which this provision was inserted in the contract is stated in the majority opinion of the Circuit Court of Appeals and is found in the facts heretofore set forth in this brief. At the very time this provision was inserted in the original contract it was contemplated between the parties that it would be superseded by the provisions contained in the supplemental contract wherein it was expressly agreed between the parties that the Railroad Commission had not fixed rates, charges or tariffs for the kind and character of services to be performed under the contract (R. 156), and another standard was fixed for determining the compensation to be paid petitioner. The provisions of the supplemental agreement, as expressly found by the court below, constituted the one, only and real agreement between the parties. As stated by that court (R. 312-313):

> "There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.
>
> "Appellee says that this provision in the supplemental contract for the payment of Steele is void, and he ignores the fact that it is a part and parcel of the only contract on which he can declare. A contract modified before there was any performance takes the place of the original one, and consists of the new terms and any provisions of the original contract which the parties agree shall remain unchanged."

The supplemental and amended contract was entered into before any services were performed, and all services were performed by Steele under such amended or supplemental agreement. Obviously, the statement made by petitioner at page 34 of his brief, to the effect that respondent agreed to pay the rates fixed by the Railroad Commission and cannot now be heard to say that it could not fix a rate, or did not fix it in accordance with law, has no basis in fact. Furthermore, the tariffs of the Commission which are sought to be here applied, do not, as agreed between the parties, describe the kind and character of service rendered by petitioner.

Two other points are made by respondent in support of his theory of estoppel. One is with respect to the testimony of respondent's traffic manager at Austin. The other is that respondent enjoyed every benefit that the State of Texas could grant under a contract carrier operation. With respect to the first assertion, we respectfully submit that there is not one line of evidence to the effect that respondent did send its traffic manager to Austin to testify; nor is there one line of evidence with respect to the nature of this witness' testimony. A complete answer to the latter point is that respondent did not receive a permit from the State of Texas. There is as much logic to this contention as there would be to an assertion that a shipper could not complain of a confiscatory or unlawful rate because it enjoyed the benefit of shipping its commodities over the lines of the carrier affected by the confiscatory or unlawful rate. Furthermore, no complaint is made of the statute as properly construed. It is conceded that the Commission could, for the protection and convenience of the public in the use

of the highways and to preserve the highways, require a contract carrier to obtain a permit, post a bond, not overload, and otherwise comply with safety measures. This is quite separate and apart from respondent's contention that the Commission went further and undertook to prescribe a rate to be charged for the services here involved when there were lacking the prerequisite facts necessary to authorize the Commission to act at all with respect to rates. Petitioner now undertakes to invoke an estoppel against respondent when he agreed by written contract, before any services were performed, that competition between himself and common carriers over the highways of Texas did not exist (a prerequisite to the Commission exercising rate-making powers at all) and that the Commission had in fact not fixed rates. How the subsequent use of petitioner's facilities under this contract could estop respondent from asserting the truthfulness of the facts agreed upon is difficult to conceive.

The cases of *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855, and *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 73 L. Ed. 390, have no application. In *Pierce Oil Co.* v. *Phoenix Refining Co.* it appears that Pierce Oil Company, a foreign corporation, applied for and obtained a permit to do business in the State of Oklahoma at a time when a statute was in effect in the state declaring a corporation engaging in the character of business Pierce Oil Company sought authority to engage in to be a common carrier. It was simply held by this Court that Pierce Oil Company, having applied for a permit to do business under the laws of the State of Oklahoma, which declared such business to be that of a common carrier,

could not thereafter complain of the constitutionality of the law on the ground that the law deprived it of its property without due process of law.

This Court in *United Fuel Gas Co.* v. *Railroad Commission, supra,* held that the Gas Company voluntarily invoked the action of the Commission and could not therefore make a legitimate complaint that an order of the Commission thus invoked deprived the Gas Company of its property without due process of law.

The facts in this case are wholly dissimilar to the facts in either of the cases relied upon and the principles of law there announced have no application here.

Further illustrative of the principle announced in *Pierce Oil Company* v. *Phoenix Refining Company* and *United Gas Company* v. *Railroad Commission,* both *supra,* is the holding of this Court in *Booth Fisheries Co.* v. *Industrial Commission of the State of Wisconsin,* 271 U. S. 208, 210, 211, 70 L. Ed. 908. It was there held that an employer could not assail as unconstitutional under the Fourteenth Amendment the Workmen's Compensation Act of Wisconsin when the employer voluntarily elected to qualify under the Act and receive the benefits thereof; the Act being elective rather than compulsory. On the other hand, the decision of this Court in *Thompson et al.* v. *Consolidated Gas Utilities Corp. et al.,* 300 U. S. 55, 80, 81, 81 L. Ed. 510, cited and relied upon by petitioner at page 48 of his brief in support of another point, demonstrates the fallacy of his position here. It was there contended that Consolidated Gas Utilities Corporation, a foreign corpora-

tion, could not challenge the validity of a section of the gas proration statute because it had invoked the benefits of part of the statute. It was held that the Gas Company was not asserting any right under the statute which it assailed. Respondent here is not asserting any right under the order of the Railroad Commission (if construed as petitioner construes it) which it assails. Receipt of the benefits of petitioner's services as a contract carrier required no affirmative steps on respondent's part. The benefits thus received resulted incidentally from the permit itself and not from any ratemaking orders which were clearly separable therefrom. The mere fact that respondent holds a permit to transact business in Texas does not deprive it of its right to complain of an unlawful order of the Commission or of an unconstitutional act of the State Constitution. *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532, 533, 66 L. Ed. 352; *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 544, 66 L. Ed. 1044.

F. If the Legislature of Texas did declare the operations of every contract carrier to be in competition with the operations of common carriers over the highways of the State, and authorized the Commission to fix minimum rates for all contract carriers, then the State Law and the acts of the Commission thereunder as applied to respondent and to the transportation services here involved contravene the Fifth and Fourteenth Amendments to the Federal Constitution and are void.

The constitutional objection here presented was raised in the trial court (defendant's answer, Pars. 10, 11, 12, R. 45 to 48; defendant's motion for an instructed verdict, Par. 6, R. 268) and in the Fifth Circuit Court of Appeals (Specifications of Error VII and VIII, pages 18 and 19, appellant's brief, and argument thereunder, at pages 94 to 97). The attack upon the constitutionality of the statute and orders and acts of the Commission do not constitute an attack upon the judgment rendered by the court below. If respondent's constitutional attack is sustained, then the judgment of the court below is correct, regardless of the reasons upon which it was grounded. Petitioner, at page 43 of his brief, quotes from the caption of the legislative enactment, which is known as *Article 911b* of the *Revised Statutes*. He contends that the caption of the Act evidences a legislative intention of conferring the power and imposing the duty upon the Railroad Commission to fix minimum rates and charges for all motor carriers operating as contract carriers, regardless of whether or not such contract carriers operate in competition with common carriers over the highways of the state, and undertakes to construe the enactment of the Legislature accordingly. Petitioner also contends that Sec. 6aa is a legislative finding that all contract

carriers operate in competition with common carriers over the highways of the state. We disagree with petitioner's construction of the Act, but if petitioner is right and we are wrong, then the Act is clearly unconstitutional as sought to be here applied against respondent and as was applied by the Railroad Commission of Texas, if petitioner's construction of the orders of that Commission is correct. The decision of *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288, does not save the Act from the attack here made because the Act as there applied did not deprive the complainant of any constitutional guarantees. Here, if so construed, it does deprive respondent of rights guaranteed it under the Fourteenth Amendment to the federal Constitution. The definitions in the Act are found in Section 1. A "motor carrier" is defined as anyone operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this state.[10] A "contract carrier" is defined to mean:

> "any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier" (Subd. [h], Sec. 1, Article 911b).

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10 Subd. (g): "The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

The evidence in this case shows that petitioner, Steele, was a private carrier transporting for respondent alone over the highways of Texas and performing private service for respondent. He was a contract carrier as defined by the Act, but the evidence showed and the jury found that his operations were not in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same as those performed by common carriers. Any attempt upon the part of the State of Texas to fix rates governing such transportation, and apply the rates thus fixed against respondent, clearly violated respondent's constitutional rights under the principles announced in *Smith* v. *Cahoon*, 283 U. S. 553, 561, 562, 563, 75 L. Ed. 1264. A declaration of the Legislature that all contract carriers operate in competition with common carriers over the highways of the state, if such a declaration was in fact made, was an arbitrary declaration and bears no reasonable relation to the regulation of the highways in the public interest. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69, 70, 81 L. Ed. 510; *Smith* v. *Cahoon, supra*. Such a declaration is as arbitrary as a declaration that all motor carriers for hire are common carriers. This character of declaration was condemned as arbitrary and unconstitutional in *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101. This Court clearly has the power to determine if petitioner's constitutional rights have been thus invaded and, if so, to strike down the Act of the Legislature and the orders of the Commission as sought to be here applied. *Thompson* v. *Consolidated Gas Utilities Corp., supra.*

G. If the Texas Statute is construed as not requiring the Commission to find the existence of facts prerequisite to the exercise of the conditional rate-making powers there conferred, then the Texas Act violates the due process clause of the Federal Constitution.

Argument upon this point does not seem necessary in view of this Court's holding in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446.

Concluding our argument under Section One, we respectfully submit that the judgment of the Circuit Court of Appeals for the Fifth Circuit was a correct judgment for the several reasons presented in this section of respondent's brief, even though this Court should conclude that the judgment of the court below was predicated upon an erroneous ground.

Section Two

Answer to Section One of Brief of Petitioner.

If we are incorrect in the propositions presented under Section One of this brief, and if the Railroad Commission of Texas did undertake to apply its common carrier tariffs to the transportation services here involved, and if the acts and orders of the Railroad Commission in this respect were valid, and did not contravene the Constitution of the United States, then we submit that the reasons assigned by the Fifth Circuit Court of Appeals in support of the judgment rendered by that court are correct, and in support thereof we submit the following points:

1

The Circuit Court of Appeals correctly held that petitioner had no contractual cause of action and in so doing did not go outside the issues or facts.

2

The Circuit Court of Appeals correctly held petitioner to be without statutory cause of action to recover the rates allegedly fixed by the Railroad Commission of Texas.

3

The Circuit Court of Appeals correctly held that petitioner could not under the Statute nor under common law recover compensation in excess of the contractual compensation paid to and received by him in settlement of services rendered.

4

The Circuit Court of Appeals correctly held that the public policy of Texas did not require that petitioner be awarded a recovery in this case.

A. Petitioner has no contractual cause of action.

The authorities cited by respondent relating to the duty of common carriers to collect established rates, and the arguments presented by petitioner upon such authorities and the principles of law therein announced, have no application whatever to this case. Petitioner was a private carrier hauling commodities for General Mills alone; the public had no right to and could not use his services under the permit granted him; he was not operating in competition with common carriers over the highways of the state and did not perform substantially the same services as

those performed by common carriers. The compensation paid him had no legitimate relation to the regulation of the highways. In fact, the Commission expressly found that the operation under the private permit would not impair the efficient public service of any authorized common carrier or common carriers serving the territory and that the operations under the permit would not unreasonably interfere with the use of the highways by the general public for highway purposes (R. 96).

Petitioner, as plaintiff in the District Court, brought suit upon the contract dated August 26, 1940, and attached the same as Exhibit "A" to his First Amended Complaint (R. 6). No reference was made to the supplemental agreement of July 31, 1941. In Paragraph V of the complaint, petitioner pleaded a right to recover in the alternative, either upon the alleged rates prescribed by the Railroad Commission *or* upon the contract.

Respondent, as defendant below, by paragraphs 14, 15 and 16 of its First Amended Answer (R. 48-51) specifically pleaded that the contract sued upon did not constitute the entire agreement and that the supplemental agreement of July 31, 1941, was a part and parcel of the full contract of the parties. In detail the answer alleged the circumstances of the execution of the two agreements as constituting the contract of the parties.

Upon trial, evidence was introduced at length establishing beyond any question that the contract of the parties was evidenced by the two agreements and was intended to be so constituted from the outset (R. 135-162).

In fact it was petitioner and his counsel who suggested and caused the agreement to be evidenced by the two agreements instead of one. (See the correspondence, defendant's Exhibits 1 to 5 [R. 140 to 151] and the opinion of the Circuit Court). There was no denial or dispute of the evidence introduced upon this point. Neither petitioner nor counsel testified.

Thus, the repeated assertions in the brief of petitioner that the point decided by the Circuit Court that the *contract* of the parties was in fact constituted by *two* separate documents, was not an issue in the case and that the Circuit Court decided a point upon facts not in issue, or not raised in the trial court (brief of petitioner, p. 25), are utterly unfounded.

Here the Circuit Court merely held that as a matter of law under the undisputed evidence, the contract of the parties was evidenced and constituted by the *two agreements*, and not one.

—10 Tex. Jur., p. 286, sec. 166.

Petitioner next asserts that the supplemental agreement was void as against public policy and thus he should be permitted to ignore that part of the contract and sue alone upon the original agreement. The vice of this argument is forcibly pointed out in the opinion of the Circuit Court of Appeals. That Court held from the undisputed evidence that there was but one contract that spoke the actual intent of the parties as to the compensation to be paid to petitioner, and that such intent was evidenced by the supplemental agreement under which all the services

were performed; that the provisions of the supplemental agreements were a part and parcel of the *only contract existing between the parties*. The court below also correctly held that a contract modified before performance, takes the place of the original contract and that all services in the case at bar were performed under the contract as constituted by the supplemental agreement. The evidence conclusively shows that at the very time the original contract was executed it was contemplated that a supplemental agreement would be entered into for the purpose of amending the compensation provisions of the original contract before any services were performed thereunder. That is exactly what was done.

Furthermore, Section 13 of the original contract (the covenant relied upon) only required respondent to pay rates promulgated by the Railroad Commission "for the kind and character of services to be rendered hereunder" (R. 91). The evidence shows that Tariff 1-A of the Railroad Commission, sought here to be applied, *did not cover the kind and character of services rendered by petitioner*, since such services so rendered were not substantially the same services as those rendered by common carriers. The tariff itself described services dissimilar in many respects. The parties to the modified contract (entered into subsequent to the order of the Commission which petitioner now asserts applied the general tariff to the services here involved) expressly stipulated:

> "It is mutually understood and agreed that the Railroad Commission of Texas has not fixed any rates, charges or tariffs, and has not promulgated any rules

and regulations respecting, for the kind and character of service to be rendered hereunder, * * * " (Record 156).

Under the stipulation of the parties and the evidence, no claim can be asserted under the covenant of the original contract *because the very standard fixed for determining the compensation to be paid thereunder failed.*

—*Canadian National Ry. Co.* v. *George M. Jones Co.*, 27 Fed. (2d) 240, 242.

Even if the Railroad Commission tariffs did fix rates for the kind and character of services here involved and the orders of the Commission made such tariffs applicable to the services rendered under the contract, it does not follow that the modified contract was void. Under Section 6-aa of the Texas Motor Carrier Act, Article 911b, *Texas Revised Civil Statutes*, the Commission *is empowered to fix minimum rates for contract carriers operating in competition with common carriers.* Such contract carriers may charge any rate they wish and can agree upon with the shipper, which exceeds the minimum. The compensation specified in the modified contract might or might not exceed the minimum rates here relied upon, dependent upon costs, which included depreciation on equipment, damage claims and losses (absorbed by respondent), administration charges, and many other elements. It is quite conceivable that the compensation required to be paid petitioner could have exceeded the minimum rates relied upon. The modified contract was therefore not void. *Charles Warner* v. *T. & P. Ry. Co.*, 164 U. S. 418, 41 L. Ed. 495; *Weatherford, M.*

W. & N. W. R. Co. v. *Wood*, 88 Tex. 191, 28 L. R. A. 526; *Wright* v. *Donaubauer*, 154 S. W. (2d) 637; *Great Atlantic & Pacific Tea Co.* v. *Warren*, 44 S. W. (2d) 510. It required actual experience to determine if the compensation required to be and actually paid was less than the alleged minimum requirements of the Commission. It is clear that petitioner cannot here recover under the covenants contained in the contract.

But if the contract were void, it could not be segregated as to lawful and unlawful portions, the invalidity permeated the entire transaction and petitioner, the "prime offender," being in *pari delicto* could not and should not recover under the contract which was fully executed long before the suit was brought.

—*Wright* v. *Wight & Wight*, 229 S. W. 881.

In 10 Tex. Jur., p. 242, Sec. 140, it is stated:

> "Where an illegal contract has been fully executed, the courts will not interfere to litigate the claims of parties *in pari delicto* who have been injured thereby; neither a court of law nor a court of equity will aid either party to recover or reinvest himself with any title or interest vested in the other, but will leave them in the same position as to vested interests as they, by their own acts, have placed themselves. So money paid under an illegal contract may not be recovered back, where the contract has been fully executed and the parties are *in pari delicto*."

We respectfully submit that upon this point a simple question of law, having no importance to the public wel-

fare or interest, was correctly decided, to-wit: That petitioner had no right to recover under the contract.

B. Petitioner has no Statutory or Common Law cause of action.

As pointed out by the Circuit Court of Appeals, petitioner was not content to stand solely upon his alleged contract. He claimed a right of recovery under the Texas statute and now also contends that he has a common law right to recover the rates and charges allegedly fixed by the Railroad Commission.

The underlying basis of the argument of petitioner is that public policy demands a recovery be allowed petitioner (not the State of Texas) in order to carry out the announced purpose of the Texas Motor Carriers Act (Article 911b, *supra*), notwithstanding the absence of a provision in that Act affording a cause of action to contract carriers such as petitioner, to recover the alleged rates prescribed by the Commission, and notwithstanding the absence of a provision in that Act making it the absolute duty of such contract carrier to collect such rates.

In brief, the stated purposes for the enactment of the Texas Motor Carrier Act are: (1) To preserve the highways of the state; (2) to protect the traveling public from injuries resulting from unrestricted use of the highways for business purposes; and (3) to eliminate descrimination in rates charged (Sec. 22b of the Act, *supra*).

While not specifically stated in the enactment itself, it is clear that another controlling purpose of the Act was

to protect common carriers from unfair competition of contract carriers operating in competition with common carriers and performing substantially similar services (see the opinion of Circuit Court of Appeals in this case and the opinion of this Court in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288).

Respondent has at no time asserted the invalidity of the Texas Motor Carrier Act if properly construed. The decision by the Circuit Court in no manner adversely affects that Act. It is conceded that the State of Texas has constitutional authority to regulate and control, in any reasonable manner, motor transportation over the highways of that state. *Stephenson* v. *Binford*, *supra*, determined that question in 1932.

In the case at bar no contention has been made that the transportation services performed by petitioner created an undue burden upon the highways of the state or injuriously affected the use thereof by others. In fact, the Commission, in granting the permit, found to the contrary and the evidence shows that all of the regulatory safety measures were made applicable to the services rendered. There is no claim that such regulatory measures were not observed.

Common carriers were not adversely affected in any respect by the transportation services rendered by petitioner or the charges made therefor. The evidence is undisputed that not one pound of tonnage was diverted from common carriers through the operations of petitioner. On the other hand, the evidence is conclusive that the class

of commodities previously shipped by respondent over common carrier lines continued to be shipped over common carrier lines throughout the period of Steele's operations.[11] The jury found and the evidence showed that Steele did not operate in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same as the services performed by common carriers. The class of commodities handled and delivered by Steele was previously handled and delivered by respondent in its own trucks operated by its own drivers. During the Steele operation such commodities were handled and delivered in the same trucks (sold by respondent to petitioner), and operated substantially by the same drivers, with the only difference being that previously the trucks were the property of respondent and the drivers its employees. Manifestly, the interest of common carriers was not adversely affected by the operation. In any event, they are not here complaining in any respect of the operations or the prices charged and received.

There was no discrimination in rates charged because, as stated by the Circuit Court of Appeals:

> "Moreover, a contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He has no other customers in whose favor he could discriminate" (R. 318).

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[11] The testimony of the witness, Frank Cross (R. 201 to 211), disclosed in detail the facts with respect to the transportation of the products of respondent over a comprehensive period of fifty-four months, in relation to transportation by common carriers. This evidence was not disputed and conclusively established that the operations of petitioner did not adversely affect the business of any common carrier.

Petitioner was not a contract carrier hauling for numerous contractees or the public at large. He hauled only for General Mills and the permit under which he operated restrained him from hauling for others.

Moreover, it may be noted that as to the *contract motor carrier*, the prevention of discriminatory rates, insofar as the public is concerned, *was not intended or provided for.* The statute only provides that in cases where it is proper for the Railroad Commission to prescribe rates (*i. e.*, for contract carriers in competition with common carriers), the Commission shall prescribe minimum rates which shall not be *less* than the rates prescribed for common carriers for substantially the same service.

This Court had occasion in *Stephenson* v. *Binford*, *supra*, to note this fact. Speaking of the authority of the Railroad Commission to prescribe rates, it was there said:

> "*The authority is limited to the fixing of minimum rates.* The contract carrier may not charge *less* than the rates so fixed, *but is left free to charge as much more as he sees fit and can obtain.*". (P. 274, official report.) (Emphasis ours.)

A contract motor carrier in Texas, operating in competition with common carriers and under a prescribed minimum rate schedule, may discriminate at will among his customers so long as he does not adversely affect the common carrier by charging *less* than the prescribed rates.

Such discrimination could not be exercised by common carriers and the common carrier cases cited in support of requiring recovery because public policy denounces dis-

crimination in rates, are not applicable here. The difference in policy between contract and common carriers is further illustrated by the fact that the contract carrier is not required by the law to file a copy of his contract of carriage nor is he required to file a schedule of rates as the common carrier is required to do. (Sec. 10 [3], Article 911b, *supra*.)

In these vital respects the Texas Act differs from the federal enactment and the enactments of some other states from which authorities have been cited by petitioner. In fact, the only regulation with respect to rates charged by contract carriers is found in Section 6aa of the Act (Article 911b, *supra*), wherein the Commission is vested with power to prescribe minimum rates for contract carriers *operating in competition with common carriers* which minimum rates *shall not be less* than rates prescribed for *common carriers performing substantially the same service*. No finding was made by the Commission that the operations of Steele were or would be in competition with common carriers or that the services to be performed by him were substantially the same services as those performed by common carriers. The facts found by the Commission in its order are to the contrary. By evidence and express findings of the jury, both of these essential elements are here lacking.

It is inconceivable that the interest of the public is here involved. If there has been a violation of the Act, the remedies specifically given the State by the Act itself

are amply sufficient to prevent recurring or future violations.

On the other hand, the Act discloses that the State is concerned in the rates charged by common carriers by motor, the same as it is concerned in the rates of common carriers by rail. Section 10 (3) of the Act requires a common carrier by motor to file with its application for a certificate of public convenience and necessity "a proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served." No similar requirement is made of contract carriers. There is no regulation of the Commission requiring any such schedule to be filed. It is true the Circuit Court of Appeals said it was appropriate and perhaps requisite that an applicant for a permit should exhibit his contract of carriage under which he proposed to operate. The Court evidently prefaced this remark upon statements made in certain letters of petitioner's attorneys preceding the execution of the written agreements wherein statements are made that a custom prevailed that a contract carrier must submit his contract to the Commission showing the rates to be charged shall be such rates as prescribed by the Commission, but the law itself makes no such requirement.

Section 6a of the Act specifies in great detail the information necessary to be set forth in an application by a contract carrier for a permit. There is no requirement that a schedule of rates be filed or exhibited. There is no evidence of any regulation of the Commission to this effect. Certainly a prevailing custom or an unwritten requirement of the Commission in this respect could not act as a

substitute for an enactment of the Legislature nor control the public policy of the State. The public policy of the State is defined by its authorized lawmaking body, not by custom or by an unauthorized requirement of a subordinate administrative board.

Regardless of the name designated, petitioner was nothing more than a private carrier hauling and performing services exclusively for respondent. Neither the public nor any other potential customer was entitled to demand his services. Common carriers were not interested in or prejudiced by the services performed by him because his operations were not in competition with or similar to the services performed by common carriers, and diverted no tonnage from such common carriers.

It therefore appears from an analysis of the evidence and of the law itself that this case differs in vital and material respects from the common carrier and contract carrier cases relied upon by petitioner.

C. Cases Cited by Petitioner Distinguished.

The case of *Papetti* v. *Alicandro*, 58 N. E. (2d) 155 (Supreme Judicial District Court of Massachusetts), is cited and quoted from at pages 18 and 19 of petitioner's brief.

An analysis of that case, however, clearly discloses distinguishing facts upon material and essential elements not present in the case at bar. The carrier there involved was operating part of the time in question as a contract carrier and part of the time as both a contract and com-

mon carrier. The carrier was required to and did file with the Department of Public Utilities a schedule or tariff of rates which were kept open for public inspection. Apparently the only essential difference between contract and common motor carriers in Massachusetts is that the contract carrier might choose his customers and operate under infrequent schedules, whereas the facilities of the common carrier were required to be kept open for all. It may be fairly inferred from the decision that the contract carrier in the *Papetti* case was operating in competition with common carriers and performing substantially the same services. In any event, the Court made no distinction between a contract carrier and a common carrier and it is not apparent that there was any contention that the contract carrier was not operating in competition with common carriers. The gist of the opinion was a denunciation of discrimination in rates insofar as shippers or the public in general was concerned. It has heretofore been demonstrated in the case at bar that this element of discrimination towards the public in the matter of rates is not involved in the case at bar. Furthermore, the Massachusetts law expressly required the contract carrier to collect the exact rate, no more and no less, specified in its filed schedule. As has heretofore been pointed out, the Texas Act does not require the contract carrier to collect a minimum rate and there is no prohibition against the charging of a rate higher than the minimum rate. In Texas the failure to observe the minimum rates, where authorized to be fixed, is simply made a penal offense and the State may institute suit for penalities against any person violating or procur-

ing the violation of any order or rule of the Commission, or suits in equity may be brought on behalf of the State to enjoin such violations. Article 1690b, Penal Code, Texas. It is significant that the Texas legislature failed to declare void contracts of a contract carrier providing for a rate less than prescribed by the Commission. In this respect the Motor Carrier Act differs from the Insurance Act, which declares void any contract or agreement not written in the application and the policy (Section 5, Article 4682b) and prohibits special favors and discriminations in the matter of rates, charges and premiums (Sec. 8, Article 4682b). The Act relating to common carriers by rail likewise prohibits discrimination in rates (Article 6448) and makes binding in all actions between private parties the published rates (Article 6452). The *Papetti* case therefore is based upon distinguishing and material features not present in the case at bar in that the contract carrier in Massachusetts is placed in the same category as a common carrier in the matter of rates; is required to file with the Department of Public Utilities a schedule of rates; is required to collect the exact rate specified in the schedule filed; is subject to a legislative enactment prohibiting any discrimination in rates, and because the facts in that case indicated no difference in the services rendered by the contract carrier involved from that of common carriers the fact and the law involved clearly distinguish the *Papetti* case from the case at bar.

Bottemueller v. *Wilson & Co.*, by the District Court for the Western District of Missouri, 57 Fed. Supp. 766, involved rates of a contract carrier operating under the

federal Motor Carrier Act. It was held that the published rates filed by the carrier with the Commission superseded the contractual rate. The federal Motor Carrier Act, Title 49, Section 318, U. S. C. A., expressly requires a contract carrier operating under the federal Act to file with the Interstate Commerce Commission tariffs setting forth the rates and charges to be filed. The tariffs are required to be open for public inspection and the carrier is expressly required to charge and collect the rates specified in the tariff. Under the federal Act a contract carrier may and frequently does haul under contract for numerous shippers. There was necessarily involved the controlling question of discrimination, not here present. The situation in the *Bottemueller* case is entirely different from that here involved.

The case of *Georgia R. R.* v. *Creety*, 63 S. E. 528, quoted from at page 21 of petitioner's brief, is simply a case involving the right of a common carrier by rail to collect from a shipper the correct published rate, notwithstanding the fact that the carrier's agent had unintentionally misquoted a lesser rate at the time the shipment was received.

T. & N. O. R. R. Co. v. *Yates*, 139 Texas 89, 161 S. W. (2d) 1050, and the subsequent case of *T. & N. O. R. R. Co.* v. *East Texas Gravel Co.*, 175 S. W. (2d) 435, announce the familiar rule that a railroad company is under the public duty of collecting from a shipper the correct rate published in the public tariffs. *T. & N. O. R. R. Co.* v. *East Texas Gravel Co.*, at pages 436 and 437, 175 S. W. (2d), announces that a railway company cannot by means of estoppel or any

other device escape the performance of the public duty required of it to collect the published rate. Nevertheless, under the facts in that case, it was held that the shipper was excused from paying the full rate by reason of the fact that the railway company delivered the shipment to the consignee and collected a lesser rate, contrary to the instructions of the shipper.

Louisville & Nashville R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59, 68 L. Ed. 900, is a case involving the duty of a common carrier by rail to collect from a shipper the published rate. This Court recognized, however, that notwithstanding this duty (265 U. S. 67, 68) a shipper might be released from the payment of the freight charges where the carrier accepts the shipment on condition that the consignee alone will be responsible for the charges.

The case of *T. & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, holds that where a railway company engaged in interstate commerce has filed its tariffs with the Interstate Commerce Commission and such tariffs have been received by the Commission, a shipper may not in the courts litigate the question of reasonableness or unreasonableness of the prescribed rates. The shipper's remedy is to apply for reparations from the Commission. The Commission and not the courts are charged with the duty of determining in the first instance the reasonableness of rates prescribed in tariffs. *Frank O. Lowden et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 518, 83 L. Ed. 953, quoted from at page 19 of petitioner's brief, is another case involving the duty of common carriers by rail

to collect the charges prescribed by tariffs. This Court held that notwithstanding a shipper announced in advance he would not pay the prescribed charge, he was nevertheless bound to do so when using the facilities furnished by the carrier. This Court said that until changed, tariffs bind the carrier and shipper alike.

Petitioner, through inadvertence we assume, quoted from the dissenting opinion of CIRCUIT JUDGE STONE, at pages 17 and 18 of his brief, rather than from the majority opinion written by CIRCUIT JUDGE SANBORN in *New et al. v. Denison Clay Co.*, 260 Fed. 70. The dissenting opinion is found at pages 73 and 74. The majority opinion merely holds that a bill of lading issued by a common carrier by rail constitutes a valid written contract on the part of the shipper to pay the lawful rates prescribed by the published tariffs and that the statute of limitations relating to written contracts rather than oral contracts applies.

The Texas cases relating to common carriers by rail announce substantially the same rule as announced by this Court and other United States courts. For instance, *Texas Central Ry. Co. v. Kerns*, 108 S. W. 187, quoted from at page 14 of petitioner's brief and again cited by him at page 25, holds that the published rate is binding upon the shipper and common carrier by-rail alike and may not be deviated from. The Texas Rail Statute so provides.

West Texas Compress & Warehouse Co. v. Panhandle & Santa Fe Ry. Co., 15 S. W. (2d) 558, quoted from at page 14 of petitioner's brief, holds that a rule of the Railroad Commission of Texas relating to common carriers by rail

with respect to stoppage of cotton in transit, and promulgated pursuant to legislative authority, is valid and binding upon shipper and carrier alike under the express provisions of statute until set aside by the Commission. It is interesting here to note that this case inferentially holds (page 561, 15 S. W. [2d]) that the courts may determine if a rule of the Commission is authorized by law. On the other hand, if the rule is authorized by law and attacked on the ground that it is unfair or unjust, the courts are without jurisdiction until the aggrieved person pursues the statutory remedy of appeal authorized by the statute. This case sustains our position that the power of the Commission to enact a rule or rate is always the subject of judicial review. On the other hand, when power is present, a rule or rate established pursuant thereto may not be attacked collaterally in the courts on the ground that the rule or rate is unreasonable or unjust. The person aggrieved must pursue his statutory remedy and may only attack the rule or rate collaterally if void.

Railroad Commission of Texas v. Uvalde Construction Co., 49 S. W. (2d) 1113, is another case involving the right of the shipper to attack in court a rate promulgated by the Railroad Commission affecting common carriers by rail. The Court held that the reasonableness of a rate promulgated pursuant to lawful authority was not the subject of judicial review in an independent action.

The Circuit Court of Appeals correctly held that cases involving freight rates of rail carriers, interstate under the federal Act and intrastate under the Texas Act, have

no application here. The interest of the public in such rates is clear. The Acts expressly required such rates to be observed by shipper and carrier. Under the Texas Act relating to rail carriers, the rates prescribed by the Commission are conclusive in all actions between shipper and carrier (Article 6452). Similar requirements are made in the federal Act relating to both carriers by rail and carriers by motor.

D. No question of public policy involved.

Discrimination is not here involved. Injurious competition to common carriers is not here involved. Safety of the highways is not here involved. Public policy of the State does not require petitioner to collect the alleged rates prescribed by the Railroad Commission in the interest of the public. The Motor Carrier Act does not denounce as void agreements with contract carriers providing for a lesser rate than the minimum fixed by the Commission. If there has been a violation of any valid order of the Commission, certainly the remedies prescribed by the Act itself are amply sufficient to protect the State. *American National Insurance Co. v. Tabor*, 230 S. W. 397, 399. We quote from the *Tabor* case:

> "The statute does not denounce as void any policy which violates its terms. The expressly declared consequences of infractions of the statute appear to be ample to secure its obedient observance. The Supreme Court of the United States was of the opinion that, where this was true, it was the reasonable implication that the Legislature meant for only the statutory

remedies to be applied, and it did not mean for courts to refuse to enforce contracts which were not declared void or unenforceable, though in contravention of the statute. *Harris* v. *Runnels*, 12 How. 79, 13 L. Ed. 901."

The Railroad Commission of Texas has not complained and is not here complaining. It must be presumed that the Commission is and has been fully informed of the compensation paid petitioner by respondent. Under Section 13b of the Act it is made the duty of the Commission to require reports to be filed by each motor carrier with the Commission of all operations under the Act. The Commission, under Section 14 of the Motor Carrier Act, is permitted to hear complaints, require production of records, and subpoena witnesses, to determine if any motor carrier is violating any provisions of the Act or any order of the Commission. No criminal complaints have been filed against petitioner. No suit for penalty has been filed. No equitable action to restrain violations of the Commission's order has been filed. All of these remedial rights are afforded the State under the Act. Article 1609b, Penal Code of Texas.

On the other hand, petitioner is here seeking to recover on the basis of his own wrong. A denial of a recovery here is more conducive to discourage rather than encourage future violations of the Act and orders of the Commission. If a recovery is permitted an unscrupulous contract carrier may, with impunity, solicit the business of a shipper upon representations that the services to be performed do not come under the purview of the ratemaking orders of the Commission, perform such services, collect the contractual

rate, and after the termination of the agreement, change his front and demand the collection of the legal rate. This is precisely what was done here. It is fairly inferable from this record that had petitioner and his counsel not so urgently insisted that the Railroad Commission rates were not applicable and that the Commission was without power to prescribe rates for services such as those to be performed by petitioner, respondent would have continued, as it had done in the past, to transport the class of merchandise involved in its own trucks operated by its own drivers.

If a recovery is permitted here, an unscrupulous contract carrier may underbid a legitimate carrier and then nevertheless, after the contract is completed, recover the same charges as those bid by his competitor. On the other hand, if a recovery is denied, unscrupulous contract carriers will be discouraged from attempting such acts as it is manifest petitioner was guilty of committing in this case. The public interest will be better subserved in denying a recovery here than by permitting it, for the very pointed reasons stated by one of the Texas Appellate Courts in the case of *Wright v. Wight & Wight*, 229 S. W. 881, from which we quote:

> "If it be conceded that the transaction in question violated the law mentioned (although we regard it as debatable), yet the appellees were parties thereto and transgressors of section 22 of the same act (article 4896), which made it unlawful for any agent 'to grant or contract for * * * any position or any valuable consideration or any inducement not specified in the policy contract of insurance.' Under section 22, anyone so offending is declared guilty of unjust discrimi-

nation. So all of the parties are *in pari delicto* in an unlawful agreement which the pleading and agreed facts discloses has been fully executed. This being true, the courts will leave the parties where it finds them. They will extend no aid to recover back money paid under such an illegal and forbidden contract. *Seeligson* v. *Lewis*, 65 Tex. 217, 57 Am. Rep. 593; *Robertson* v. *Marsh*, 42 Tex. 151; *Glenn* v. *Mathews*, 44 Tex. 405" (Page 882, 229 S. W.).

In answer to the contention that public policy requires a recovery, the Court further said:

"Appellees say, however, they should be allowed to recover because the public interest will be better promoted by granting than by denying them relief. It is true that as between parties *in pari delicto* relief will be granted if public policy demands it. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is served. The relief is granted to discourage such transactions by others.

"But, we think, the public interest will be just as well served by denying a recovery to the appellees as it would be by granting such recovery and imposing the loss upon the appellants. Insurance agents will be discouraged from making and carrying out discriminatory agreements when they know that the courts will not allow them to recover back money which they have expended in pursuance of such forbidden contracts." (Page 882, 229 S. W.)

Furthermore, it should be emphasized that the Circuit Court of Appeals did *not* hold, nor can it be possibly in-

ferred that the Court held, that the rule of *pari delicto* could be asserted to bar recovery by a *common* carrier of lawfully prescribed tariffs.

The Texas cases of *Herrin Transportation Co.* v. *Marion*, 113 S. W. (2d) 291; and *Central Freight Lines, Inc.* v. *C. & S. Motor Freight Lines*, 125 S. W. (2d) 615; cited and quoted from by petitioner, have no application.

The *Herrin Transportation Co.*, case involved a *common carrier* operating under a certificate of convenience and necessity. The common carrier filed tariffs with the Railroad Commission and thereafter made a contract with the shipper to transport commodities at a lesser rate. The shipper undertook to enforce the transportation agreement and to recover damages because the rate charged by the carrier was in excess of the contract rate. The Court merely held that the rates fixed by the Commission controlled and that damages could not be recovered against the common carrier growing out of a breach of a contract to transport the commodities at a rate less than the Commission rates. *The Court left the parties where it found them.*

Central Freight Lines, Inc. v. *C. & S. Motor Freight Lines, supra*, involved a controversy between *common* carriers. One sold its certificate of convenience and necessity to another under a verbal agreement that the purchaser should forego certain pickup privileges afforded under the certificate. The Railroad Commission approved the sale of the certificate but the restrictive agreement was not submitted to nor approved by the Commission. The seller under-

took in an equitable action for injunction to enforce the parol agreement and enjoin the purchaser from exercising the pickup privileges. It was held that injunction would not lie to enforce an illegal *executory contract*.

The case of *Brown & Root* v. *Traders & General Insurance Co.*, 135 S. W. (2d) 534; cited and quoted from at page 31 of petitioner's brief, in no sense supports petitioner's theory. On the other hand, the effect of the decision is against petitioner's contention. This was a case involving reparations under the Insurance Act. The State Insurance Department erroneously classified the risk involved and applied a rate higher than was justified. Later the error was discovered and the department reclassified the risk so as to apply the proper rate and made the rate retroactive to a prior date. The insured contended that the corrected rate should have been made retroactive to the anniversary of the policy, and by way of cross action in a suit brought by the insured to recover the premium, sought credit for the excessive rate during the period of time the Insurance Department refused to make the corrected rate retroactive. It was contended that the orders of the Insurance Department were binding and could not be reviewed by the court. The Galveston Court of Civil Appeals (writ of error refused, correct judgment, Supreme Court) distinguished between the ratemaking and administrative powers of the Commission, holding that classification of risks under existing tariffs was merely an administrative; not a ratemaking, function and that the Commission should have made the corrected rate retroactive from the anniversary date of the policies, and judgment was rend-

ered in favor of the insured accordingly. This was not an appeal from the orders of the Commission but an independent suit brought in a different jurisdiction from that in which an ordinary appeal would lie. No question of public policy was presented in the case. Both sides to the controversy recognized that the Commission had originally erroneously classified the risk and applied the wrong rate and both sides recognized the power of the Commission to change the classification. The only question involved was whether the order should have been made retroactive to the anniversary date of the policies or at some more recent date. We have previously, at page 88 hereof, distinguished between the Motor Carrier Act relating to contract carrier rates and the Insurance Act relating to public insurance rates.

Petitioner's position is most unusual. The record discloses without dissent that at the time the contract was negotiated and executed petitioner and his counsel were of the opinion that the transaction entered into was a perfectly legal one. The record discloses that petitioner and respondent in writing agreed that the Railroad Commission of Texas had not prescribed rates for the kind and character of service to be rendered by petitioner and the parties fixed the basis for the charges to be made. The permit had been granted and all ratemaking orders now relied on were then in existence and well known to petitioner and his attorney. For three years petitioner hauled for respondent and billed respondent for charges in accordance with the contract. Each month there was an accounting between the parties for the previous month's charges. Not until the

contract was terminated did petitioner or his counsel, who have represented him throughout, conceive the idea (so far as the record shows) that the transaction was illegal and that the Railroad Commission rates applied. The record does not indicate the reason for the change in front. The Circuit Court of Appeals significantly said:

> "Surely a Daniel has come to judgment and from what a remarkable source!"

Petitioner should not now be permitted to take advantage of his own wrongs. The paramount purpose of public policy is to prevent inducements for the commission of a wrong. Again we repeat that public policy is much better subserved by the judgment rendered in the court below than it would be if a recovery was allowed petitioner in this case based on his own wrong. The public interest cannot be legitimately served by such a recovery nor does public policy demand it.

Section Three

The two-year Texas Statute of Limitation prohibits a recovery on so much of petitioner's cause of action as accrued more than two years before the institution of the suit in the District Court.

If petitioner has any cause of action at all it is one for a debt not evidenced by a contract in writing and therefore must be commenced and prosecuted within two years after the cause of action accrued under Article 5526 of the Revised Statutes of Texas. The pertinent parts of the statute are as follows:

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: * * *

"4. Actions for debt where the indebtedness is not evidenced by a contract in writing."

The contract in writing in this case defeats petitioner's cause of action. His cause of action, if he had one, is purely a suit for debt arising by operation of law. The carrier cases, such as *Texarkana & Ft. S. Ry. Co. et al.* v. *Houston Gas & Fuel Co.*, 51 S. W. (2d) 284, cited and quoted from at page 58 of petitioner's brief, have no application. The four-year statute of limitation applies in that class of cases because the shipments moved under written bills of lading expressly or impliedly obligating the payment of the tariff rate. The cause of action was predicated on the bill of lading. There is no bill of lading here involved. The only written contract between the parties requires the payment of the charges actually paid. The cause of action for a part of the charges allowed petitioner in the trial court's judgment arose more than two years before the institution of the suit. Defendant pleaded the two-year statute of limitation and complained of the action of the trial court in rendering judgment in petitioner's favor for so much of the cause of action as accrued more than two years before the commencement of the suit by appropriate specifications of error (page 22, appellant's brief in Circuit Court of Appeals, and page 116, wherein argument was presented thereon).

Section Four

Specifications of Error presented in the Fifth Circuit Court of Appeals and not decided by that Court are not waived but here insisted upon.

Respondent by its Specifications of Error V and VI, presented in its brief in the court below, complained of the action of the trial court in filing Findings of Fact and Conclusions of Law, and particularly in filing Findings of Fact upon fact issues submitted to the jury and determined by the jury in their special verdict; such verdict not having been set aside (page 17, appellant's brief, Circuit Court of Appeals).

The argument upon these Specifications is found at pages 73 to 80 of appellant's brief. The Circuit Court of Appeals did not deem it necessary to pass upon these Specifications. Respondent by Specifications of Error VII and VIII in the Fifth Circuit Court of Appeals complained of the action of the trial court in excluding competent evidence offered by it from the witness, Frank H. Cross (page 21, appellant's brief in Circuit Court of Appeals). The argument in support of these Specifications is found at pages 107 and 111. The Circuit Court of Appeals did not find it necessary to pass upon these Specifications.

By Specifications of Error XIV, XV and XVI respondent complained of the trial court's charge in placing the burden of proof upon respondent to establish the negative of the issues submitted; of the action of the trial court in refusing to afford respondent the right to open and close the evidence; and of the action of the trial court in with-

drawing from the consideration of the jury upon the issues submitted respondent's Exhibits 1 to 6, inclusive (correspondence found in the Record, pages 140 to 143). The Specifications of Error are found in appellant's brief in the Fifth Circuit Court of Appeals at pages 21 to 22, and the argument thereunder at pages 111 to 115. The Specifications of Error last referred to were not passed upon by the Circuit Court of Appeals. Respondent's Specification of Error XI in the Circuit Court of Appeals complained of the action of the trial court in overruling defendant's motion to strike or, in the alternative, to require petitioner to make more certain and definite certain allegations in the complaint. This Specification of Error is found at pages 20 and 21 of appellant's brief in the Circuit Court of Appeals and the brief of argument thereunder at page 106. This Specification of Error was not passed upon by the Circuit Court of Appeals.

The undetermined Specifications of Error are still insisted upon by appellant and are not waived.

Specifications of Error XI, XII, XIII, XIV, XV and XVI only become important if for any reason this cause is remanded to the trial court for a new trial. Specifications of Error V and VI are submitted as further grounds supporting the judgment rendered by the Fifth Circuit Court of Appeals.

IN CONCLUSION respondent respectfully prays of this Court that the judgment of the Fifth Circuit Court

of Appeals be in all things affirmed and that respondent be granted all other relief as it may be entitled to and allowed its costs.

Respectfully submitted,

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November, 1946.

BRIEF AMICUS CURIAE

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NO. 1056 79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

LEO H. STEELE,
Petitioner

V.

GENERAL MILLS, INC.,
Respondent

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE*

on

THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

LEO H. STEELE,
Petitioner

v.

GENERAL MILLS, INC.,
Respondent

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE*

on

THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

May It Please the Court:

The State of Texas respectfully files brief as *amicus curiae* on the application of petitioner for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

The State entered this litigation as *amicus curiae* after the judgment of the United States Circuit Court of Appeals for the Fifth Circuit. The Circuit Court recognized the validity of the entrance of the State in the following opening paragraph of its Per Curiam opinion: "We are indebted to the Attorney General of the State of Texas for his able brief as *amicus curiae* on the petition for rehearing." The petition for rehearing was denied.

The record discloses that petitioner, a private citizen of Texas, applied for a Texas contract carrier permit upon the basis and for the purpose of transporting respondent's products only. Respondent is a Delaware Corporation with a permit to do business in Texas. In the application, petitioner agreed to charge the rate promulgated by the Railroad Commission of Texas and there was submitted to the Commission prior to the granting of the permit a contract between petitioner and respondent stipulating, among other things, that the rate to be charged by petitioner and paid by respondent "shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." The order granting the permit contained the provision "in connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the

rates prescribed for common carrier motor carriers." Shortly after the granting of the permit, petitioner and respondent entered into a second contract, which was never submitted to the Railroad Commission, setting a rate for the services to be performed under the contract carrier permit of cost plus ten per cent; this rate was less than the Texas minimum contract carrier rate. Petitioner charged and respondent paid under the second contract.

The following statement in appellant's (respondent here) brief to the Circuit Court of Appeals is correct:

> "There was no controversy in the trial court, nor is there any here, with respect to the quantity of tonnage handled by appellee; the number and dates of the trips made; the points between which the commodities were handled; and the kind and class of commodities. Both parties were in agreement with respect to the amount of money actually paid appellee and likewise the amount appellee would have been entitled to if he is entitled to apply the tariff rate relied upon by him to the commodities handled and to recover the difference between the contractual compensation paid and the tariff rate relied upon." (Page 23)

The record discloses that petitioner transported the commodities of respondent under his contract carrier permit from August 1, 1941, to October 31, 1943, moving a total tonnage of 424,919,582 pounds. He was paid $44,803.33; under the minimum Texas contract carrier rates, he would have been paid

$77,814.98. This law-suit is for the difference.

Enforcement of the Texas contract carrier rate structure is involved in this case. Petitioner's contract carrier application; the hearing before and order of the State administrative agency, the Railroad Commission of Texas, granting the permit; the general contract carrier rate orders of the Railroad Commission and the specific rate order applicable to the contract carriage of petitioner for respondent, are representative of the Texas contract carrier system.

There is no disagreement in the judicial expressions in this case regarding the validity of the Texas contract carrier rates or the applicability of the prescribed minimum rates to the contract carriage of petitioner for respondent. The Circuit Court judgment (Circuit Court Judges Waller and Lee composing the majority; Circuit Judge Hutcheson, the dissent) however, denied petitioner's recovery of the minimum contract carrier rates on the ground that the parties were *in pari delicto* in their arrangements represented in the second contract, hence will be left where they were. This judgment was believed by the State of Texas to be erroneous and because of its serious effect upon the integrity of the Texas contract carrier rate structure, the State filed a brief as *amicus curiae* on the petition for rehearing.

In the Per Curiam opinion denying the petition for rehearing, before Circuit Judges Waller and

Lee, no cognizance was taken of the fundamental proposition urged by the State; namely, that it is in the public interest that carriers collect and shippers pay the legally prescribed minimum contract carrier rates, notwithstanding the parties are *in pari delicto* in their joint violations. The reasoning of the Per Curiam opinion, and of the cases and texts cited, goes only to the question of allowing one party *in pari delicto* relief against the other, entirely separate and apart from the additional consideration of allowing recovery for the public good.

It is the conviction of the Attorney General of the State of Texas that the judgment of the Circuit Court of Appeals, in giving controlling effect to the *pari delicto* doctrine in a freight rate rebate suit, establishes a new precedent of far reaching implications. It is believed contrary to the precedents of this Court and of the Courts of Texas and other States, and to call for an exercise of this Honorable Court's power of supervision. The State of Texas is not concerned with the interests of either petitioner or respondent in this case, nor in their motives, whether innocent or fraudulent. It is vitally interested, however, in strict compliance by motor carriers and shippers in Texas with its legally prescribed freight rates, and in the integrity of its transportation system—rail and truck—to which the maintenance of the freight rate structure is essential.

The subject matter of this brief lends itself most appropriately to the following two headings:

THE TEXAS CONTRACT CARRIER

The single point: Texas Minimum Contract Carrier Rates, and Their Enforcement, are Matters of the Public Interest; Advancement of the Higher Public Policy Inherent in Strict Enforcement of Such Rates Calls for Intervention by the Court, Notwithstanding the Carrier and Shipper Are in Pari Delicto in Their Joint and Mutual Rate Violations.

THE TEXAS CONTRACT CARRIER

The Texas contract carrier and the minimum rates applicable to him rest on the following legislative, judicial, administrative, and procedural cornerstones.

Statutory references are to Sections and Subsections of Article 911b, Revised Statutes of Texas; these statutes are quoted here, rather than set out in an appendix, for purposes of continuity.

Article 911b is a comprehensive regulation of Texas motor carriers with the following declaration of policy in Section 22b:

> "The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and

hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

Section 1(g) defines "motor carrier":

"(g) The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

Section 1(h) defines "contract carrier":

"(h) The term 'contract carrier' means any

motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier."

Section 1a(1) provides: "Provided, however, that the term 'Motor Carrier' and the term 'Contract Carrier' as defined in the preceding section shall not be held to include:"

"(a) Any person having a regular, separate, fixed, and established place of business, other than a transportation business, where goods, wares, and merchandise are kept in stock and are primarily and regularly bought from the public or sold to the public or manufactured or processed by such person in the ordinary course of the mercantile, manufacturing, or processing business, and who, merely incidental to the operation of such business, transports over the highways of this State such goods of which such person is the bona fide owner by means of a motor vehicle of which such person is the bona fide owner;"

And Section 1b:

"Any person who transports goods, wares, or merchandise under the circumstances set forth in the foregoing Section Ia so as to be excluded by the terms of said Section from the definition of 'motor carrier' or 'contract carrier' shall be deemed to be a private motor vehicle owner; and such use of the highways by such private motor vehicle owners, as herein defined, shall be construed as use of the highways for the general public and not the use of such highways for

the carrying on the business of transporting property for compensation or hire."

Section 4(a) reads in part:

"The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to prescribe or approve the maximum or minimum or (sic) maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, * * *"

and in other respects subjects contract carriers as motor carriers to regulation by the Railroad Commission of Texas.

Specifically as to contract carriers, Section 6 requires a permit from the Railroad Commission to engage in business as such, which permit shall not "be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier."

Section 6(c) further provides "nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory * * *"

Section 6aa specifically provides for minimum contract carrier rates, as follows:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

Section 20 provides for appeals from orders of the Railroad Commission and reads in part as follows:

> "If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. * * *"

The penal provisions of the Act are codified as Article 1690b, Penal Code of Texas; Section (i) thereof reads:

> "If any motor carrier, or any officer, agent, clerk, servant, or employee, or receiver, or his agents, servants, or employee, of any motor car-

rier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, draw-back, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said Commission, such contract carrier or any officer, clerk, servant, or employee, or receiver, his agents, servants, or employee, of such contract carrier shall be guilty of a misdemeanor and, upon conviction shall be fined in a sum not to exceed Two Hundred Dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids, or abets any contract carrier in the violation of the provisions hereof shall likewise be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than Two Hundred Dollars ($200.00) for each offense."

The Texas statutes thus delineate private carriers as not subject to the regulations of Article 911b, and regulate common carrier motor carriers and contract carrier motor carriers in the competitive business of transporting property for compensation or hire over the highways of Texas. The legislative purpose that common carriers shall not be impaired by contract carriers, either in the granting of contract carrier permits or in the rates to be collected by contract carriers, is clear and fundamental.

This Honorable Court, speaking through Mr. Justice Sutherland in *Stephenson* v. *Binford*, 287 U. S.

251, upheld the Texas statutes regulating contract carriage, and at page 273 precisely drew the connection between the public purpose in relieving the highways of traffic and the legislative provision for minimum rates for contract carriage, in these words:

> "What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed ,but is left free to charge as much more as he sees fit and can obtain * * *"

Pursuant to the legislative mandate in Sections 4a and 6aa, Article 911b, the Railroad Commission of Texas promulgated minimum rates for Texas contract carriers in the following orders.

The order of August 22, 1931:

"State of Texas.

"Railroad Commission of Texas.

"Austin.

"Commissioners: C. V. Terrell, Chairman, Lon A. Smith,,

"Pat M. Neff, C. F. Petet, Secretary.

"General Order No. 25.

Austin, Texas, August 22, 1931

"Whereas, Chapter 314, of the General Laws of the State of Texas, passed by the Forty-first Legislature, Regular Session, as amended by Chapter 24, of the General Laws of the Second Called Session thereof, having been further amended by Chapter 277 of the Acts of the Forty-second Legislature Regular Session, by declaring all persons, firms, co-partnerships, corporations, companies, associations and joint stock associations other than common carriers, engaged in the transportation of property for compensation or hire over the highways of Texas, to be Contract Motor Carriers.

"And Whereas, said above mentioned acts imposed upon the Railroad Commission of Texas, the duty to fix, prescribe or approve rates and charges of such Contract Motor Carriers, as well as to fix, prescribe or approve just and reasonable rules and regulations to be observed by such Contract Motor Carriers.

"It is, Therefore, Ordered by the Railroad Commission of Texas, that, effective August 22, 1931, all Contract Motor Carriers as hereinbefore defined, be and they are hereby ordered to observe and apply as minimum temporarily and until further orders of this Commission, pursuant to hearing called for Monday, August 31, 1931, under Motor Freight Circular No. 1297, the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Class 'A' Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended; Railroad Commission of Texas Motor Freight General Rules Circular No. 1, as amended; and Railroad Commission of Texas Commodity Tariff No. 2, (Cotton and Cotton Linters), as amended.

"Penalties.

"If any motor carrier, or any officer, agent, clerk, servant or employee or receiver, or his agents, servants, or employee, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said commission, such contract carrier or any officer, clerk, servant or employee or receiver, his agents, servants, or employee, of such contract carrier shall be guilty of misdemeanor and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions here-

of, shall likewise be guilty of a misdemeanor and, upon conviction shall be punished by a fine of not more than two hundred dollars ($200.00) for each offense."

The order of July 26, 1940

"Motor Freight Class and Commodity Tariff

No. 1-A Effective 7-26-40.
"Seventh Revised Page 15 (Cancels 16th Revised Page 15).

"Section No. 3.

"General Application of Rates.

"Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed:

"(A) By Common Carrier Motor Carriers on Texas Interstate Traffic. (See Exception.).

" * * * *

"(B) By contract motor carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary."

The history of petitioner's contract carrier application to transport the commodities of respondent is typical of such proceedings in Texas.

Under date of August 26, 1940, petitioner applied to the Railroad Commission of Texas for a per-

mit to operate as a contract carrier for respondent, the application proposing the transportation of property for compensation or hire over the highways of Texas other than as a common carrier motor carrier or as a private carrier. Exhibit E of the application read:

> "Applicant proposes that the tariff to be charged for the service proposed to be rendered will be that as promulgated by the Railroad Commission of Texas."

After requisite notices, hearings, and submission to the Commission of the first contract between petitioner and respondent, embodying the agreement to conform to the rates prescribed by the Commission, the Railroad Commission granted petitioner's application by its order dated June 16, 1941, the pertinent provisions of which read as follows:

> "The Commission, after carefully considering the evidence the laws and its own rules and regulations, is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier; and that the proposed operation of the applicant as a contract carrier within a radius of 150 miles of Wichita Falls, and within a radius of 150 miles of Amarillo, will not impair the efficient public service of any authorized common carrier or common carriers now adequately serving the same territory. In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract car-

riers the rates prescribed for common carrier motor carriers."

It is therefore apparent that petitioner sought a Texas contract carrier permit to transport the products of respondent upon the representation and agreement of both parties to charge the rates promulgated by the Railroad Commission, and that in the order of the Commission granting the permit, specific rates were prescribed for, and made applicable to, petitioner's contract carriage services for respondent.

As heretofore mentioned, the judicial expressions in this case are in agreement that the Texas contract carrier rate structure is valid and that the minimum contract carrier rates fixed by the Railroad Commission attached to the contract carriage of petitioner for respondent. This statement is predicated upon the following excerpts from the majority and dissenting opinions of the Circuit Court of Appeals. The majority said:

> "We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those

> provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

It is manifest that the only basis upon which the second contract (wherein the parties set their own rates) would be void is that such contract contravened valid statutes and rate orders of the Railroad Commission; the parties could obviously contract for their own rates if there were none prescribed by law applicable to them.

The dissenting opinion by Judge Hutcheson reads:

> "I think it clear that the district judge was right in the view he took, that the authorities in Texas leave in no doubt that rates prescribed by the Texas Railroad Commission are the only proper rates which may be charged and that a cause of action arises out of the statute in favor of any person who performs the services for which the rates are prescribed. The Railroad Commission's general order of 1931, therefore, prescribing common carrier rates as minimum rates was applicable to Steele's permit and was valid and enforceable."

It would therefore appear that the payment by respondent to petitioner of less than the minimum Texas contract carrier rates resulted in an unlawful freight rate rebate and that this is an ordinary rebate suit, touching which, in the words of the dissenting opinion of Judge Hutcheson, "an overriding public policy," upon which "the right to recover the legal charges. . . rests . . . is so imperative that it

may not be defeated by the conduct of the parties in entering into legal and evasive arrangements which it is the very purpose of the policy to strike down."

The evasive arrangements referred to in the above excerpt from the dissenting opinion consisted of the second contract between petitioner and respondent, entered into after the granting of the contract carrier permit, in which the parties set their own rate of cost plus ten percent, which rate was lower than the minimum contract rate fixed by the Railroad Commission. Since the circumstances, purposes, and provisions of this contract are discussed at great length in the judgment of the Circuit Court, additional analysis is pretermitted here; suffice to say, the particular arrangements between the parties resulted in the rebating of rates, the knowledge and purposes of which were joint and mutual between petitioner and respondent.

POINT I

Texas minimum contract carrier rates, and their enforcement, are matters of the public interest; advancement of the higher public policy inherent in strict enforcement of such rates calls for intervention by the Court, notwithstanding the carrier and shipper are in Pari Delicto in their joint and mutual rate violations.

BRIEF OF ARGUMENT

The original public policy of the State of Texas regarding the establishment and enforcement of freight and passenger tariffs crystallized in relation to the railroads. Texas Constitution, Article 10, Section 2; *Producers Refining Company* v. *M. K. & T. Ry. Co.*, 13 S. W. (2d) 679; and companion case, same style, 13 S. W. (2d) 680; *Texas and N. O. Ry. Co.* v. *Yates, et al*, 139 Tex. 89, 161 S. W. (2d) 1050; *Texas and N. O. Ry. Co.* v. *East Texas Gravel Co.*, 175 S. W. (2d) 435. Pertinent elements of this policy are: The chief function of the State administrative agency, the Railroad Commission, is to fix rates binding alike upon shipper and carrier and subject to revision only in the mode expressly provided; the prevention of rate discriminations and rebates; the public duty of the carrier to collect, and the shipper to pay, the legally prescribed rates, which obligation cannot be affected by estoppel, mistake, design, positive contract to the contrary, or by any other device; and, as said by the Commission of Appeals of the Supreme Court (opinion adopted by Supreme Court) of Texas in *T. and N. O. Ry. Co.* v. *Yates*, supra, "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in *Houston & T. C. R. Co.* v. *Johnson*, Tex. Com. App., 41 S. W. (2d) 14, 83 A. L. R. 241."

With the advent of highway freight and passenger transportation in Texas, these principles have

been applied with equal force and reason by the Legislature and Courts of Texas to highway motor carriers. In *Texas & P. Ry. Co. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930, it was said:

> "Development of motor transportation in the past two decades, and the increasing use of the highways for commercial purposes by both common and private carriers, with consequent safety hazards and impairment of road beds, has necessitated stringent regulation thereof in the public interest. The primary objective and reasons therefor were to protect the safety and convenience of the public in the use thereof, and to preserve the highways themselves, constructed with the taxpayers money. But these were not the only purposes sought in such regulation. The Act in question clearly discloses the additional purposes of preserving other established lines of transportation, and even though a public need be shown for additional operation, a further studied effort is shown to prevent, through regulation, unfair, discriminatory, or destructive competition between such authorized carriers as would ultimately impair their usefulness."

The public purpose served by the regulation of contract carriers in Article 911b of the Revised Statutes of Texas, was recognized by this Honorable Court in *Stephenson* v. *Binford*, supra, pp. 272, 273:

> "Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment. Sproles v. Binford, 286 U. S. 374, 388-389. Leaving out of consideration common carriers by trucks, impairment of the railway freight service, in the very nature of things, must result, to some de-

gree, in adding to the burden imposed upon the highways. Or stated conversely, any diversion of traffic from the highways to the railroads must correspondingly relieve the former, and therefore, contribute directly to their conservation. There is thus a substantial relation between the means here adopted and the end sought. This is made plain by the Sproles case, supra (p. 394):

"'The State has a vital interest in the appropriate utilization of the railroads which serve its people, as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain. * * *'".

To like effect are the Texas Supreme Court cases of Ex parte Sterling, et al., 122 Tex. 108, 53 S. W. (2d) 294, and *New-Way Lumber Company v. Smith*, 128 Tex. 173, 96 S. W. (2d) 282. Also, *Anderson v. Thomas*, 26 Pac. (2d) 60, by the Supreme Court of Oregon; *Commission v. Grimshaw*, 53 Pac. (2d) 1, and *State v. Grimshaw*, 53 Pac. (2d) 13, by the

Supreme Court of Wyoming; *Riley* v. *Lawson*, 143 So. 619, by the Supreme Court of Florida; and *Kelly* v. *Finney, et al*, 194 N. E. 157, by the Supreme Court of Indiana.

The recognition by this Honorable Court in *Stephenson* v. *Binford*, supra, of the public purpose in the legislative provision for minimum contract carrier rates was cited earlier in this brief. Coupled with the specific purpose of diverting traffic from the highways, is the corollary public purpose of non-impairment of common carriers, both rail and highway. The vulnerable point of impairment is in the matter of rates, and the safeguard of non-impairment is strict enforcement of the legal rates. It is in the highest public interest that the pivotal and vital limitation on Texas contract carrier operations in the matter of minimum rates shall not be undermined or ways opened for successful private contracts, undercharges, and rebates between contract carriers and shippers in Texas; to permit such a result would destroy the two public purposes inherent in the Texas contract carrier freight rate structure: the utilization and non-impairment of existing carriers, railroad and truck; and the reduction of traffic on the highways of Texas which flows from such non-impairment and maximum utilization.

This Honorable Court has held on many occasions that applicable freight rates are binding alike upon carrier and shipper; that no mistake, device, scheme, or subterfuge will relieve a carrier of the obligation to collect, and the shipper of the obligation to pay,

such rates; and that to hold otherwise would countenance the very practices condemned by the law. It was early said in *G. F. & A. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197:

> "* * * But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. Chi. & Alt. R. R. v. Kirby, 225 U. S. 153, 166; Kansas Southern Ry. v. Carl, supra; A., T. & S. F. Ry. v. Robinson, 233 U. S. 173, 181; Southern Ry. v. Prescott, supra. * * *".

The case of *Papetti* v. *Alicandro*, 58 N. E. (2d) 155, by the Supreme Judicial Court of Massachusetts, is singularly in point here. The statutes of Massachusetts are almost identical with those of Texas regulating contract carriers. Papetti was a Massachusetts contract carrier from February, 1937, until March, 1940, when he became a common carrier; in both capacities he was authorized to carry the commodities involved. "During the entire period the Department of Public Utilities established minimum rates for the carriage of such commodities by contract and common carriers"; (Page 156 of opinion). Papetti transported gasoline and fuel oil for Alicandro, was paid the legal rate upon

statements rendered, after which he rebated to Alicandro in cash the difference between the legal rate and a lower rate agreed upon between the parties. Suit was by Papetti to recover the difference between the minimum legal rate and the amount actually received by him for the transportation services. The opinion of the court upholding Papetti's right to recover notwithstanding the illegality of the scheme which was acquiesced in both parties, is a full and comprehensive brief upon the questions involved in that, and in this case, including excerpts from opinions by this Honorable Court which are controlling and conclusive. Such following portion of the opinion is therefore adopted as the brief of the State of Texas at this point:

> "Unless the plaintiff is prevented by some rule of law, he is entitled to maintain this action. *We think that the plaintiff not only is not so barred, but that it is both his right and duty to recover the rebates.* The provisions of G. L. (Ter. Ed.) c. 159B, as inserted by St. 1934, c. 264, and as revised by St. 1938, c. 483, bear resemblance respectively to the provisions of the interstate commerce act, as to railroads, 49 U. S. C. A. §§ 6, 2, 10 and as to common carriers by motor vehicle, 49 U. S. C. A. §§ 316-327 the latter being first enacted in 1935, 49 U. S. Stat. 558-567. With respect to the former Federal enactment numerous decisions of the Supreme Court of the United States and of this court are authorities for the plaintiff. 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must

pay.' Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 653, 33 S. Ct. 391, 395, 57 L. Ed. 683. The 'effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike, and from which there could be no departure.' Boston & M. R. R. v. Hooker, 233 U. S. 97, 112, 34 S. Ct. 526, 528, 58 L. Ed. 868, L. R. A. 1915B, 450. 'The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. *The consignee could not escape the liability imposed by law through any contract with the carrier.*' New York Cent. & H. R. R. v. York & Whitney Co., 256 U. S. 406, 408, 41 S. Ct. 509, 510, 65 L. Ed. 1016; Pittsburgh, C., C. & St. L. R. Co. v. Fink, 250 U. S. 577, 582, 40 S. Ct. 27, 63 L. Ed. 1151. See Texas & P. R. Co. v. Mugg & Dryden, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011; Texas & P. R. v. Abilene Cotton Oil Co., 204 U. S. 426, 445, 446, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 485, 486, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A., N. S., 671; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 33 S. Ct. 391, 57 L. Ed. 683; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 98, 35 S. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; Baldwin v. Scott County Milling Co., 307 U. S. 478, 484, 485, 59 S. Ct. 943, 83 L. Ed. 1409. In Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U. S. 516, 521, 59 S. Ct. 612, 614, 83 L. Ed. 953, it was said, 'This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less

than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.' 'The lawful rate as established by the rates and schedules filed by the carrier must be collected.' American Ry. Exp. Co. v. Mohawk Dairy Co., 250 Mass. 1, 6, 7, 144 N. E. 721, 723, 35 A. L. R. 14. The carrier cannot be estopped to do so. New York, N. H. & H. R. Co. v. York & Whitney Co., 215 Mass. 36, 40, 102 N. E. 366. Railway Express Agency, Inc. v. Michelson, 311 Mass. 704, 706, 42 N. E. 2d 805. Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165. See cases collected in 13 C. J. S., Carriers, § 397. See also Perkins v. New York, N. H. & H. R. Co., 232 Mass. 336, 339, 122 N. E. 306; W. H. Blodget Co. v. New York Cent. R. Co., 261 Mass. 365, 370, 159 N. E. 45, 55 A. L. R. 900; New York, N. H. & H. R. Co. v. Lord & Spencer, Inc., 273 Mass. 583, 586, 174 N. E. 179. *The usual principles of illegality in contracts have no application.* See Metz Co. v. Boston & M. R. R. 227 Mass. 307, 309, 310, 116 N. E. 475. The established rates are a matter of public right, and only the running of the statute of limitations can preclude a carrier from recovering the full amount. As was said in Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59, 65, 44 S. Ct. 441, 442, 68 L. Ed. 900, 'No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. *Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full*

> *amount by a person liable therefor.'* See Midstate Morticultural Co. Inc. v. Pennsylvania R. Co., 320 U. S. 356, 64 S. Ct. 128; Louisville & N. R. Co. v. Dickerson, 6 Cir., 191 F. 705, 709; McFadden v. Alabama Great Southern R. Co., 3 Cir., 241 F. 562, 565; Louisville & N. R. Co. v. Williamson, 5 Cir., 87 F. 2d 34, 35; Pennsylvania R. Co. v. Titus, 216 N. Y. 17, 22, 109 N. E. 857, L. R. A. 1916E, 1127 Ann. Cas. 1917C, 862." (Emphasis added).

Artic Roofings, Inc. v. *Travers*, 32 Atl. (2d) 559, by the Supreme Court of Delaware, is likewise directly in point with reference to analogous provisions of the Federal Motor Carrier Act. The suit was to recover the difference between freight charges actually received by the carrier and the amount due according to the schedules filed. The opinion recites "Moreover, it is not denied that all of the essential elements of actionable fraud appeared; but the materiality of these allegations is questioned." The following excerpts from the opinion of the Court demonstrate the application of the principles to the case at hand:

> " * * * but, notwitstanding the admitted fraud of the carrier, the intended purpose and scope of the Federal Motor Carrier Act, 49 U. S. C. A. § 301 et seq., will not permit the application of these general principles.
>
> " * * * The Motor Carrier Act was based on sound reasons of policy, for the general public good, and was intended to prevent direct or indirect discriminations in transportation rates, when an interstate carrier operates under it, he

has no liberty of choice in fixing charges by a special contract with the shipper. * * *

"The Act being primarily for the public good, the principles of estoppel will not defeat the carrier's rights, though he unintentionally misquoted the scheduled rate to the shipper before the delivery of the goods for transportation, and material losses were caused thereby. * * * Nor can there be any real distinction between a mere unintentional misrepresentation and a fraudulent misrepresentation by the carrier. Kansas City So. R. Co. v. Carl supra. (227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683). In either case, the usual common law rights of the individual shipper are subordinated to the statutory requirement of uniformity in rates; and while there may be cases of hardship, the general legislative policy, declared by the Act, controls."

In accord with the foregoing cases and, it is believed, in conflict in principle with the Fifth Circuit Court judgment in the instant case, are the Fifth Circuit Court cases of *Western Grain Co.* v. *St. Louis-San Francisco Ry. Co.*, 56 F. (2d) 160; *Battles* v. *Braniff*, 146 F. (2d) 336; and *Bowen Motor Coaches* v. *N. Y. Casualty Co.*, 139 F. (2d) 332.

Also in accord are the Texas cases of *Herron Transportation Co.* v. *Marmion*, 113 S. W. (2d) 291; *H. and T. C. R. Co.* v. *Johnson*, 41 S. W. (2d) 14, 83 A.L.R. 241; *Texas and N. O. Ry. Co.* v. *Yates*, supra; *Brown & Root, Inc.* v. *Traders and General Ins. Co.*, 135 S. W. (2d) 534 (Writ dismissed, correct judgment).

In our State and National Jurpisurdence, therefore the *pari delicto* doctrine has had no place in suits involving collection by the carrier and payment by the shipper of legally prescribed freight. This is because the public interest in freight rates, and in their enforcement, transcends the public policy involved in the rule of non-intervention in behalf of a party *in pari delicto*. The applicable rule in this respect is succinctly stated in 12 American Jurisprudence, page 731, paragraph 215, as follows:

> "The fiction of acting for the public by which relief is granted to a party *in pari delicto* must *a fortiori* apply to the public itself when in fact acting in its own interest. The extension of the rule of non-enforceability, based as it is upon the maxim 'in pari delicto' to the case of the State seeking to prevent public injury would be without the slightest foundation in sound logic or justification in right reasoning."

Relief is given to the public through a party *in pari delicto*, even though he is a *particeps criminis*, for the achievement of a superior public purpose. The New Jersey Court of Error and Appeals in *McCarter* v. *Firemen's Insurance Company*, 73 Atl. 80, 87, quotes with approval the statement of the rule in Story, Eq. Jur., paragraph 298, as follows:

> "In cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The

reason is that the public interest requires that relief should be given; and it is given to the public through the party."

The effect and result of the judgment of the Circuit Court in the instant case is aptly expressed in the McCarter case, supra, at page 87 in these words:

> "Be this as it may, the fact is that, if upon neither of these grounds preventive relief may be had by the State, no combination can be so hostile to the public interest, or so flagrant in its defiance of public policy, but that it may effectively shield itself from such interference on behalf of the public, by the simple device of casting its proposed violation of public policy in the form of a contract for a self-imposed restraint of trade. I cannot believe that this is the actual state of our jurisprudence on this vitally important subject."

The compulsion of this higher public policy was likewise given effect by the Montana Supreme Court in *Fergus County* v. *Osweiler*, 86 Pac. (2d) 410, 411, in these words:

> "While generally a party to an illegal contract will not be permitted to enforce it, yet there is an exception to the rule which has been so uniformly accepted by the court that it is no longer regarded as an exception, but has itself become a general rule. It is succintly stated in the Restatement of the Law of Contracts, Section 601, as follows: 'If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on parties for whose protection the law

making the bargain illegal exists, enforcement or recision, whichever is appropriate, is allowed.'"

In accord is the Texas case of *Wright* v. *Wight & Wight*, 229 S. W. 881.

The holding of the Circuit Court majority is demonstrated by the following paragraph from its original opinion:

> "Moreover, when General Mills and Steele agreed to the insertion of paragraph 13, as suggested and drawn by Mr. Morgan, for the sole purpose of getting by the Railroad Commission, well knowing that such a provision was not to be a permanent part of the contract and that it was not expected to be retained or complied with; they committed a fraud upon the lawfully constituted officials of the State of Texas, viz., the Railroad Commission. The conclusion seems inescapable that both parties knew full well that this was a subterfuge, and that neither had any idea of paying the rates provided for in that instrument, and that their participation in the execution thereof with the intent to use it only as a 'front' for getting a permit for Steele was an act contrary to good morals and that tended to injustice and to interfere with the purity of the administration of the law such as puts both parties *in pari delicto* with no right to seek advantage or recovery out of paragraph 13, the spurious portion of the instrument."

In its Per Curiam opinion denying the petition for rehearing, the Circut Court majority enlarged its application of the *pari delicto* doctrine to include the

following two elements which were applied to the subject matter of this case: The carrier (petitioner here) is the "prime offender"; the contract sued on by the carrier having been fully executed, rather than executory, the Court should not lend its aid to one in preference to the other. The Texas case of *Wright* v. *Wight & Wight*, supra, and the case of *Spring Company* v. *Knowlton*, 103 U. S. 49, together with texts from 10 Tex. Jur., page 242, paragraph 140, and 12 Am. Jur., page 725, paragraph 213, were cited in support of the conclusions in the Per Curiam opinion.

The Circuit Court did not take cognizance of the fundamental principle advocated by the State; namely, that it is in the public interest that carriers collect and shippers pay the legally prescribed contract carrier rates, notwithstanding the parties are *in pari delicto* in their joint violations. The reasoning of the Per Curiam opinion, and of the cases and texts cited, is pertinent only to the restricted question of allowing one party *in pari delicto* relief against the other party, separate and apart from the further proposition of allowing recovery in the public interest. The latter is the larger and pivotal question.

This was precisely the point in the Texas case of *Wright* v. *Wight & Wight*, supra, cited in the Per Curiam opinion and the reasoning of that Court demonstrates the correct logic. The contract in the case was fully executed and it was urged "Appellees say, however, they should be allowed to recover be-

cause the public interest will be better promoted by granting than by denying them relief." The Court recognized the validity of this proposition and disposed of it not upon the fact that the contract was executed, rather than executory, but upon the broader conclusion that the public interest would be more greatly served by denying recovery under the facts of that case:

> "It is true that as between parties *in pari delicto* relief will be granted if public policy demands it. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is served. The relief is granted to discourage such transactions by others.
>
> "But, we think, the public interest will be just as well served by denying a recovery to the appellees as it would be by granting such recovery and imposing the loss upon the appellant."

The Knowlton case by this Honorable Court and cited by the Circuit Court, did not involve in any respect the proposition that higher public policy called for intervention in behalf of a party *in pari delicto;* this Court was concerned only with the contract as between the parties themselves, in which case the law is that recovery back may be had to prevent the illegal thing from being done; whereas, if the illegal scheme has been fully executed, recovery by either party will be denied. But these propositions have no relevancy to a case where the particular relief or recovery is

in the public interest, where considerations of the status of the unlawful scheme are immaterial, and where the basis for the non-application of the *pari delicto* doctrine is constant. The correct analysis of the situation is effectively set forth in *Georgia R. R. v. Creety*, 5 Ga. App. 424, 63 S. E. 528, 529:

> "A contract or an agreement, executed or executory, for a rate different from the published rate, is void itself, but does not render the transportation wrongful, or the agreement to transport void or illegal, in the sense that services performed under it may not lawfully become the subject matter of an action in the courts. Merchants' Cotton P. and S. Co. v. Ins. Co. 151 U. S. 368, 388, 14 Sup. Ct. 367, 38 L. Ed. 195, 205."

With reference to the classification of the carrier by the Circuit Court as the "prime offender," the Knowlton case, cited by the Circuit Court, recognizes that the application or non-application of the *pari delicto* doctrine, and hence of the exception to the application in the greater public interest, cannot turn on a determination of which of the parties is in the greater delictum; this Court noted at page 60:

> "The rule is applied in the great majority of the cases, even when the parties to the illegal contract are *in pari delicto*, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial."

In a contract carrier freight rate rebate case it is illogical to say, as did the Circuit Court, that the carrier is the "prime offender" because his trucks used the highways of the State; this for the obvious reason that it is for the transportation of the shipper's commodities, *and his only*, that the highways are used by the shipper's contract carrier. And it is certainly clear under the facts of this record that if, as held by the Circuit Court, petitioner and respondent committed a fraud upon the Railroad Commission, they were each a *particeps criminis* for mutually gainful purposes, the undercharge arrangements under the second contract between them being of mutual design and purpose.

The judgment of the Circuit Court held the second contract between petitioner and respondent, wherein they set their own rates, to be illegal and void, but the result of the judgment is to enforce this contract. Any such contract, or similar device, between any shipper and carrier in Texas will be an illegal contract, which fact will be inevitably known to both parties. There cannot be degrees of fraudulent conduct, and hence degrees of the application of the doctrine of *pari delicto*, in such a situation.

The unassailable fact is that nothing will more effectively prevent violations of the Texas minimum contract carrier rates by contract carriers and shippers in the manner involved in this case, than the knowledge of shippers that regardless of mistakes, private contracts, subterfuges, rebates, or what else, the carrier can successfully recover the amounts of

the minimum legal rates prescribed for the services rendered. Opportunity and incentive for circumvention of the rates will be thereby eliminated. This fact is implicit in the uniform holdings that carriers will be allowed recovery of the legal rates.

It is observed, finally, that the majority opinion of the Circuit Court intimates that the fact that the Texas statutes authorize penalty suits against rate violators by the Attorney General for the State of Texas, comprehends the full public interest in the enforcement of freight rates. The fact of these allowable penalty suits does not imply that such prosecutions, even under circumstances where they would lie, are to be considered as the adequate, and the only, public remedy. Penal provisions are characteristic of the Federal Motor Carrier Act and of the various State Motor Carrier Acts; it has never been held or suggested that this fact bore any relevancy whatever to the enforcement and collection of legal freight rates by means of civil suits for recovery of voluntary or involuntary freight rate rebates.

CONCLUSION

The public interest in Texas minimum contract carrier rates, and in their enforcement, is equal in importance and strictly analogous to the enforcement of common carrier freight rates in Texas. The fundamental basis for the public policy involved is the same. Variations in the particular statutes relating to the different forms of carriage do not affect the underlying requirements of rate enforce-

ment. The settled law that the courts will compel payment of the amount of the legally prescribed freight rates for the particular transportation services performed is applicable with equal force to each form of carriage. The shippers and carriers are agents and trustees for the public and the actions of neither or both should defeat the purposes of the law which require full and exact payment of legal freight rates in the public interest.

There have not been exceptions to the above rule in either national, state, or Texas jurisprudence, regardless of the presence of elements of mistake, fraud, estoppel, hardship, or other circumstances. Most usually, however, hardship is non-existent and the equities are in favor of neither the carrier nor the shipper. This is demonstrated here. It was the obligation of respondent, a foreign corporation doing business in Texas, to observe and respect the laws of Texas and the orders of the administrative agency of the State, the Railroad Commission, in the use by respondent of a Texas contract carrier permittee performing transportation services for respondent only. The minimus of this obligation is compliance with the rates fixed by the Railroad Commission for the transportation of Respondent's commodities over the highways of Texas by a Texas motor carrier. Apart from knowledge of Texas law with which respondent is charged, and bound to respect, the record is clear that respondent through its agents collaborated in, and acted with full knowledge of, every phase of the matters involved in this case. Respondent elected to utilize for its benefit a

creature of the Texas statutes—the Texas contract carrier—and is bound to the obligations of such usage. *Compare Pierce Oil Co.* v. *Phoenix Refg. Co.*, 259 U. S. 125, 66 L. Ed. 855; *Shepard* v. *Barron*, 194 U. S. 553, 565, 48 L. Ed. 1115; *St. Louis Malleable Casting Co. v. Prendergast Const. Co.*, 260 U. S. 469, 472, 67 L. Ed. 351.

No equities or other considerations are present in this case to justify the abrogation of settled law and the defeat of the high public policy inherent in strict enforcement of the contract carrier rates of the State of Texas.

It is respectfully suggested that the judgment of the Circuit Court of Appeals for the Fifth Circuit is error of such magnitude as to call for an exercise of this Honorable Court's power of supervision and that this Honorable Court should grant petitioner's Application for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ZOLLIE C. STEAKLEY, JR.
Assistant Attorney General.

JAN 27 1947

No. 79

In The

Supreme Court of the United States

OCTOBER TERM, 1946

LEO H. STEELE,
Petitioner,

VERSUS

GENERAL MILLS, INC.,
Respondent.

PETITION FOR REHEARING

GENERAL MILLS, INC., *Respondent.*
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January 24, 1947.

UTTERBACK TYPESETTING CO., 13 S. WALKER, OKLAHOMA CITY, 4, OKLA.

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No. 79

In The

Supreme Court of the United States

October Term, 1946

Leo H. Steele,
Petitioner,

VERSUS

General Mills, Inc.,
Respondent.

PETITION FOR REHEARING

Respondent General Mills, Inc., respectfully petitions the Court for a rehearing in the above cause and prays for a reconsideration of the opinion delivered January 6, 1947, for the following reasons:

I.

The decision leaves undecided by this Court the fundamental question of the interpretation of Section 6aa, Article 911b, Texas Revised Statutes.

We submit that the Circuit Court of Appeals did not directly consider or determine this question, which was the basis of respondent's defense in this action in the trial court and on appeal, but specifically stated that it did not enter

into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier that was *not* in competition with common carriers. 154 Fed. (2d) 367, at page 372.

That Court apparently was so firm in its opinion that petitioner should not recover because of his conduct in bringing about the contract in question, that it proceeded, assuming that applicable rates had been duly established by the Railroad Commission, to deny recovery upon an application of the doctrine of *pari delicto*. This point was in fact a collateral or secondary issue in the case. Respondent has at all times primarily challenged the power and authority of the Railroad Commission, by reason of the specific terms of the Texas Statute, to fix rates for contract carriers who were *not* in competition with common carriers. This basic question was not determined by the Circuit Court and in effect was disposed of in this Court by following the opinion of the District Judge, without consideration of the merits of the question. Such a result in substance denies to respondent an appeal upon this important issue.

It is submitted that an examination of the final judgment in the trial court (R. 80) and the conclusions of law of the trial judge (R. 72-75) fail to disclose a specific consideration of the import of Section 6aa upon the point here urged or to interpret that statute insofar as the question of limited and qualified rate making power was delegated to the Railroad Commission. The trial judge did conclude that by Article 911b, the Texas Legislature conferred upon the Railroad Commission, the power and duty to regulate

all carriers, but that conclusion falls far short of interpreting Section 6aa as conferring power to fix rates for contract carriers, absent the fact of competition with common carriers. Respondent has never denied the right of the Railroad Commission to regulate all carriers as an exercise of the police power.

No decision of any Texas court and no decision of any other federal court has been cited to support the construction of Section 6aa, as granting or delegating to the Railroad Commission unlimited or unqualified power or authority to fix the rates of contract carriers or to fix rates of contract carriers who were *not* in competition with common carriers.

To our knowledge such a position has never before been asserted by the Texas Railroad Commission or any other person.

To the contrary, we refer to the article by Professor Edward W. Bailey, Professor of Law, University of Texas, found in Texas Law Review, Vol. XX, No. 2, issue of December, 1941, at pages 165, 171 and 172. The following extract is taken from the article of Professor Bailey bearing upon the exact point here involved:

> "Thus it is clear from the language of the new statute, as well as from the history of the period, that one of the predominant objectives of the new legislation was the protection of existing carriers, including the railroads, against unnecessary and harmful competition.

"This new motivation is apparent in the provisions of the Act empowering the Commission to fix rates for the motor carriers. Section 4(a) makes it the duty of the Commission to fix the rates and charges ' * * * of each motor carrier in accordance with the specific provisions * * * ' of the Act. Section 6aa imposes the duty on the Commission:

"' * * * to prescribe rules and regulations covering the operation of *contract carriers in competition with common carriers over the highways* of this state and (that) the Commission shall prescribe minimum rates, fares, and charges to be collected by *such contract carriers* which shall not be less than the rates prescribed for common carriers for substantially the same service' (Italics supplied).

"Thus the contract carrier, now for the first time brought within the regulatory powers of the Commission, is made subject to the rate-making power, *but only when it competes with the common motor carrier and then the power of the Commission is restricted by a prohibition against fixing the rates of the contract carrier at a level lower than that prescribed for the common carrier.* The intent to regulate the contract carrier to the end that the common carrier may be protected against ruinous competition is clear" (Emphasis last paragraph ours).

This Court in *Stephenson v. Binford*, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. Ed. 288, clearly noted the qualification of competition with common carriers as prerequisite to the authority of the Texas Railroad Commission to fix the rates of private contract carriers, and a similar reference was made in *Texas & Pacific Ry. Co.* v. *Railroad Commission et al.*, 138 S. W. (2d) 927, at page 930.

We most respectfully urge that respondent and this Court ought not be finally bound by an implied interpretation of the Texas statute by the trial judge, but this Court should examine and determine the issue presented, otherwise an appeal is an empty gesture.

II.

The decision herein also leaves undecided by this Court the Related Constitutional Question of the violation of the Due Process Clause of the Fourteenth Amendment.

If Section 6aa be interpreted to delegate or grant to the Railroad Commission unlimited or unqualified power or authority to fix rates for *all* private contract carriers, we respectfully urge that the law must fall under the authority of *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264, and *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101. Neither the opinion of the Circuit Court nor that of this Court passed upon this question, which has been urged by respondent at all times, and thus again respondent is denied consideration and determination of this major question upon appeal and left bound by the decision of the court of first instance. Certainly this issue was not one of local law.

III.

The decision herein leaves undecided by this Court the question of the legal sufficiency and legality of the orders of the Railroad Commission, should they be construed as actually fixing rates applicable to the service performed by petitioner.

The order of the Railroad Commission (Motor Freight Class and Commodity Tariff No. 1-A, effective July 26, 1940) asserted to be a general rate making order applicable to the operations of the petitioner, was entered long before the negotiations between the parties in this case, and long before his type of service was contemplated. The respondent was not a party to the proceeding in which that order was entered nor was respondent a party to the proceeding in which petitioner secured his permit. Upon determining the application of petitioner for a permit, there were no findings of fact by the Railroad Commission that brought the operations of petitioner within the purview of the rate making power of the Railroad Commission. This issue of the validity of these orders, if construed as applicable to the service performed by petitioner, which issue has also been urged by respondent at all times, was not determined by either the Circuit Court of Appeals or by this Court.

Under the authority of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446 and *Wichita R. R. & Light Co.* v. *Public Utilities Commission of the State of Kansas*, 260 U. S. 48, 67 L. Ed. 124, we believe the said orders are clearly void insofar as the same purport to fix rates applicable to the contract of carriage involved in this case. See also: *Railroad Commission of Texas* v. *Fort Worth and Denver City Rail-*

way Co., 161 S. W. (2d) 560, writ of error refused, want of merit, Supreme Court of Texas; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co. et al.*, 167 U. S. 479, 42 L. Ed. 243; *Texas Motor Coaches, Inc.* v. *Railroad Commission of Texas et al.*, 41 S. W. (2d) 1074.

The collateral attack rule has no application.

—*Texas Liquor Control Board* v. *Cannon*, 147 S. W. (2d) 927.

IV.

The Doctrine of *Pari Delicto*

It is indeed a result startling to respondent that petitioner, who asserts and confesses to the suggestion and instigation of an illegal transaction, should profit thereby.

Respondent has never asserted a wrongful intent in the transactions here involved and now earnestly asserts its good faith in entering into the contract in question.

It is submitted that the record shows that in fact respondent relied upon the representations of petitioner and his counsel in permitting the contract to be formulated as was done. An important fact has been overlooked by this Court and a misstatement of fact made in the opinion where it is stated that, "Petitioner and Respondent entered into a written contract under which the Petitioner was to transpor goods for Respondent by truck entirely within the State of Texas at '*such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas*'."

The contract in fact provided for the payment of rates, charges or tariffs as may be fixed by the Commission, "*for*

the kind and character of services to be rendered hereunder" (R. 155, 156).

In the light of the record of the *insistence* by counsel for petitioner that the Railroad Commission had *not* fixed rates for the special kind and character of service to be rendered by petitioner, we insist that these words in the contract are important and material; they explain the reason for the supplemental contract which did provide a definite method of arriving at compensation to be paid petitioner. The supplemental contract was predicated upon the assertion that applicable rates were not established. It was therefore necessary to agree upon compensation to petitioner which was fixed upon the cost plus basis. Respondent may have carelessly or inadequately investigated the facts of the matter but any confession of bad faith by petitioner should not extend or be imputed to respondent.

We say that petitioner should not profit by his confessed bad faith and fraud, and such is the present result, because respondent gained nothing at the expense of the public from the transaction involved in this case. The service petitioner rendered was one that respondent had theretofore performed for itself. There was no question of, or occasion for, avoiding rates fixed by the Railroad Commission. Respondent could have continued its self service with petitioner as its employee. The public was in no manner affected by changing to a cost-plus employment of petitioner who could not, either under his contract or his permit, extend any operation or service respondent had theretofore conducted for itself; could not transport for any other person; could not compete with any other carrier.

We sincerely urge that these facts take this case out of the "public policy" exception to the rule that a person may not take advantage of his own wrong.

CONCLUSION

For the foregoing reasons, which we believe material, respondent respectfully prays for a rehearing herein and that mandate be stayed, pending consideration hereof.

Respectfully submitted,

GENERAL MILLS, INC., *Respondent.*
By ALFRED MCKNIGHT,
Sinclair Building,
Fort Worth, Texas,

IRA BUTLER,
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Fort Worth, Texas,

CHARLES E. FRANCE,
First National Building,
Oklahoma City, Oklahoma,
Attorneys for Respondent.

Charles E. France,

Certificate

Charles E. France of counsel for respondent in the above cause does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Charles E. France

Certificate of Service

Charles E. France, one of the attorneys for respondent in the above cause, does hereby certify that a copy of the foregoing Petition for Rehearing was today deposited in the United States mail, postage prepaid, in an envelope addressed to Messrs. C. A. Morgan and T. S. Christopher, attorneys of record for petitioner, First National Bank Building, Fort Worth 2, Texas.

January 24, 1947.

Charles E. France

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SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1946.

Leo H. Steele, Petitioner, v. General Mills, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 6, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner and respondent entered into a written contract under which the petitioner was to transport goods for respondent by truck entirely within the State of Texas at "such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas." Based on that contract petitioner applied to the Commission for a permit to operate as a contract carrier pursuant to rules of the Railroad Commission promulgated under Texas law which grants regulatory power over transportation to that Commission. Article 911 (b), §§ 1 to 22 (b), Rev. Stat. of Tex. Petitioner's application stated that "the tariff to be charged for the service proposed will be that as promulgated by the Railroad Commission of Texas." After notice and hearing, at which petitioner and a representative of respondent testified, the Commission made an order which stated that "After carefully considering the evidence, the laws and its own rules and regulations," the Commission was of the opinion that "the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier." The order directed that petitioner be granted a permit, which was later issued, to transport goods for respondent in Texas, but directed attention to the fact that the Commission's "tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rate prescribed for common motor carriers." Later, pursuant to a prearrangement, the parties entered a supplemental agree-

ment concerning which the Railroad Commission was kept uninformed, in accordance with which respondent actually paid petitioner for carriage of its goods less than the rates prescribed for common motor carriers. About three and a half years later the petitioner filed this suit, of which the District Court had jurisdiction by reason of diversity of citizenship, to recover the full rate fixed by prior general orders of the Commission prescribing common carrier rates as provided in the contract.

The respondent's answer admitted that it had paid less than the tariff rate fixed in prior general orders, but denied legal liability to pay that rate on several grounds. It denied that respondent's rates were governed by the Commission's prior general rate orders or by the special order granting petitioner a permit as a contract carrier. It also claimed that a State two-year statute of limitations barred recovery for part of the amount claimed. It further alleged that petitioner had led respondent to believe that his type of transportation was not subject to regulation by the Railroad Commission, and that no prior general or special orders had fixed petitioner's transportation rates. In reliance upon the petitioner's representations, respondent alleged, it had entered into the supplemental agreement to pay less than the tariff rate here claimed. Respondent pleaded that by this conduct petitioner was estopped from claiming that the Commission had power to or has fixed a rate for petitioner's transportation, or from predicating his cause of action upon the Commission's tariffs.

The District Court rejected all of respondent's contentions. Citing Texas statutes, court decisions, and the Commission's practices, the District Court held that the cause of action was not barred by the statute of limitations; that the Commission's prior general rate orders governed the charges to be fixed by contract carriers such as petitioner; that Texas law barred respondent from any

collateral attack on the validity of the orders; that had the rate fixing orders been directly attacked, as authorized by law, they would have been held valid; that shippers and carriers could not by private agreements defeat the State's statutory purpose to require payments of uniform transportation rates; that the original agreement to pay the Commission-fixed rate was valid, and the supplemental agreement to pay less than that rate was void; and that, under Texas law, petitioner was not estopped to rely on the Commission's tariff in order to recover the full tariff rate. Accordingly, the District Court directed the jury to return a verdict for petitioner for the balance due it under the Commission rate, and a judgment for the petitioner was entered on that verdict.[1]

The Circuit Court of Appeals, one judge dissenting, reversed. 154 F. 2d 367. The majority concluded that petitioner should not recover because the agreement to pay less than the full rates was a subterfuge, that neither party had any intention of living up to the agreement, and that their conduct amounted to a fraud upon the Railroad Commission, "contrary to good morals and that [it] tended to interfere with the purity of the administration of the law, such as puts both parties *in pari delicto* with no right to seek advantage of recovery . . ." on the "spurious" con-

[1] The court permitted respondent to offer evidence intended to show that the petitioner's contract carriage was neither in competition with common carriers nor substantially the same type of services as common carriers performed. This evidence was offered to support respondent's contention that the Commission was without jurisdiction to fix petitioner's rates because, as respondent urged, § 6 aa of the State motor carrier law limited its power to fix contract carrier rates to motor carriers that did compete with or perform substantially the same services as common carriers. These two questions were submitted to the jury, and they made special findings on the issues in respondent's favor. The district court later directed the jury to find for petitioner despite these findings, holding, as set out in the opinion, that the Commission's orders were valid and beyond collateral attack in this case.

tract. The dissenting judge did not agree that the records showed a deliberate purpose to evade the statutes. He further thought that under controlling Texas law and policy the doctrine of *pari delicto* could not be applied so as to have the goods of a Texas shipper hauled in Texas at a less rate than the others were compelled to pay by law. All the judges agreed, however, that the agreement to pay less than the Commission-fixed rates was void.

On petitioner's motion for rehearing the State Attorney General intervened. He contended that the court's decision ran counter to the State's long-established policy against discriminatory transportation rate-cutting, and that if the judgment stood, it would impair the integrity of the State's regulatory system, a primary purpose of which was, he argued, to assure uniform rates to all shippers for substantially the same transportation service. In its opinion denying rehearing, the court reaffirmed its former holding and stated that this was "a suit by one party *in pari delicto criminis*, against another in like situation under a fully executed contract, whereon it was sought to penalize to the extent of $37,000 and to reward the prime offender in like amount." Whether the Circuit Court of Appeals' judgment does undermine the transportation policy of Texas is a question of such importance that we granted certiorari to review the case. — U. S. —.

The District Court specifically held that no part of the claim sued on was barred by the Texas statute of limitations and the Circuit Court of Appeals did not discuss the question. Article 5526 of the Revised Statutes of Texas, on which respondent relies, by its language applies only to actions for debts not "evidenced by a contract in writing." The contract here sued on was "in writing." Respondent has cited no Texas decisions which have considered this statute to be a bar to suits on contracts such as the one here involved. We cannot say that the District Court sitting in Texas erred in holding that no part of the claim was barred

by Article 5526. See *Texarkana & S. Ft. Ry., et al.* v. *Houston Gas & Fuel Co.*, 121 Tex. 594, 51 S. W. 2d 284.

Nor can we say that the District Court and the Circuit Court of Appeals erred in interpreting Texas law to render the supplemental agreement between petitioner and respondent designed to circumvent payment of Commission-fixed rates void and unenforceable. The District Court's holdings that the Commission's rate fixing orders applied to petitioner's business, that they were not subject under Texas law to the collateral attack here made, and that petitioner could not carry respondent's goods at less than the rates fixed were well buttressed by state statutes and court decisions.[2] No arguments here made by respondent or state decisions on which it relies refute the District Court's reasoning or conclusion. The Circuit Court of Appeals has not disagreed with this holding of the District Court sitting in Texas. Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas federal judge. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280; *Henderson* v. *Thompson*, 300 U. S. 258, 266; *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 74–75. Therefore we can proceed to consider whether the Circuit Court erred in holding that respondent could escape payment of the Commission fixed rates by application of the doctrine of *pari delicto*.

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[2] The District Court cited the following authorities to support its position: Art. 911b Rev. Stat. of Tex.; General Order No. 1, R. R. Comm. of Tex., Aug. 22, 1931; *Texas Steel Co.* v. *Ft. Worth & Denver C. Ry. Co.*, 120 Tex. 597, 40 S. W. 2d 78; *Greer* v. *R. R. Comm. of Tex.* (Tex. Civ. App.) 117 S. W. 2d 142; *St. Louis I. M. & S. Ry.* v. *Londa & Storey* (Tex. Civ. App.) 187 S. W. 358; *R. R. Comm. of Tex.* v. *Uvalde Construction Co.* (Tex. Civ. App.) 49 S. W. 2d 1113; *Alpha Petroleum Co.* v. *Terrell*, 122 Tex. 257, 59 S. W. 2d 364; *Mingus* v. *Wadley*, 115 Tex. 551, 285 S. W. 1084. It also cited the following federal cases: *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *United Fuel Gas Co.* v. *R. R. Comm.*, 278 U. S. 300.

Respondent does not refute what the Texas courts have frequently decided, that agreements by railroads to cut charges to below tariff rates are unlawful and that no doctrine of estoppel or *pari delicto* can be invoked to defeat payment of the full tariff rate. In *Texas & N. O. R. R.* v. *Yates*, 139 Tex. 89, 93, 161 S. W. 2d 1050, 1052. The Texas court said, "In a word the purpose of our statutes as they relate to intrastate freight rates is in every essential respect the same as that of the federal statutes which we had under consideration in *Houston & T. C. R. Co.* v. *Johnson* (Tex. Com. App.) 41 S. W. 2d 14, 83 A. L. R. 241." Just as 49 U. S. C. § 41 (3) prohibits rebate and similar devices which might undermine interstate transportation rate systems, so Art. 1690 (*f*), § i of the Penal Code of Texas makes it unlawful for motor carriers to charge less than commission-fixed rates, and Art. 1687 makes it unlawful for railroads to engage in the same practice. No Texas decisions referred to by the Circuit Court of Appeals or by the respondent here indicate that the State's public policy is any different or less effective in protecting the integrity of motor carrier rates than railroad rates. The Texas motor carrier legislation was designed to be a part of a state transportation regulatory system applicable alike to all lines of transportation which represents a "studied effort to prevent, through regulation, unfair, discriminatory, or destructive competition between such authorized carriers as would ultimately impair their usefulness." *Texas & P. R. Co.* v. *R. R. Commission* (Tex. Civ. App.) 138 S. W. 2d 927, 930 *rev'd on other grounds*, 138 Tex. 148, 157 S. W. 2d 162. *Cf. Stevenson* v. *Binford*, 287 U. S. 251, 272–273.

Under Texas law the payment of commission-fixed carrier rates is not merely a private obligation between shippers and carriers. The duty to pay is a public one, *H. & T. C. R. Co.* v. *Johnson* (Tex. Comm. App.) 41 S. W. 2d 14. And, as said in the *Yates* case, *supra*, with reference

to a railroad, no carrier can "by means of estoppel or by any other device' escape the performance of this public duty." While the doctrine of *pari delicto* might be applied in Texas to some types of contracts so as to defeat recovery, see *Wright* v. *Wight & Wight* (Tex. Civ. App.) 229 S. W. 881, we are satisfied that the Circuit Court of Appeals erred in holding that Texas courts would apply it in this case. Application of the doctrine of *pari delicto* in this proceeding, therefore, where the federal court has jurisdiction by reason of diversity, would result in applying a rule of law in the federal courts different from the rule we believe has been applicable in the state courts. Such a result cannot be approved. *Holmberg* v. *Armbrecht*, 327 U. S. 392.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed. It is so ordered.

Reversed.